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ABSTRACT

This booklet explains and reproduces the text of the 1978 amendments to the Age Discrimination in Employment Act (ADEA). It also gives the actual committee on conference report as well as reports of the House labor committee and the Senate human resources committee. In its introductory explanation, the booklet discusses the most publicized features of the amendments--the increase in the age limit on coverage from 65 to 70 and the prohibition against mandatory retirement based on the age of employees below the age of 70. Finally, it discusses procedural changes in the act that affect not only the method by which the act is enforced but also what remedies an aggrieved person may seek. It concludes that under the new standards, employers will need to evaluate all of their employees, young as well as old, to avoid charges of age discrimination. Applying these new standards to all of the employees could lead to the termination of more younger employees than would have been the case before the age act was amended. (Author/LD)

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Part 2

1978 AGE DISCRIMINATION ACT AMENDMENTS

Explanation of 1978 Age Discrimination Act Amendments
Report of Committee on Conference, Including
Text of H.R. 5383
Text of Age Discrimination Act, as Amended
Report of House Labor Committee
Report of Senate Human Resources Committee

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Correction: In the special report on the 1978 Age Discrimination Act Amendments, it was stated on page 3 that the amendment will "forbid a seniority system or employee benefit plan to require or permit the involuntary retirement of an employee under the age of 70 (Effective: Date of enactment...)" This amendment is effective on the date of enactment for employees under age 65. But it will not be effective until January 1, 1979, for employees age 65 through 69. (Note: A special provision governs those covered by collective bargaining agreements, as discussed on page 4.)

AGE DISCRIMINATION IN EMPLOYMENT ACT AMENDMENTS OF 1978

The most publicized features of the amendments to the Age Discrimination in Employment Act are the raising of the upper age limit on coverage from 65 to 70 and the addition of a prohibition against the forced retirement based on age of employees below the age of 70. However, the amendments also contain a number of procedural changes in the Act that affect not only the method by which the Act is enforced but also what remedies an aggrieved person may seek.

The amendments will do the following:

- Forbid a seniority system or employee benefit plan to require or permit the involuntary retirement of an employee under the age of 70 (Effective: Date of Enactment except for employees covered by collective bargaining agreements in effect on September 1, 1977);
- Permit the compulsory retirement at age 65 of employees employed in a bona fide executive or a high policymaking position and entitled to a pension of at least $27,000 per year (Effective: January 1, 1979);
- Allow colleges and universities to retire tenured employees at age 65 until July 1, 1982 (Effective: January 1, 1979);
- Authorize a jury trial of any issue of fact in an action under the Age Act, regardless of whether equitable relief is being sought (Effective: Date of Enactment);
- Change the former requirement that an aggrieved person file a notice of intent to sue with the Secretary of Labor to a requirement that he file a charge with the Secretary (Effective: Date of Enactment);
- Toll the running of the statute of limitations for up to one year while the Secretary attempts conciliation of the dispute (Effective: Date of Enactment); and
- Eliminate the maximum age for retirement of 70 that presently applies to U.S. Government employees (Effective: September 30, 1978).

I. INCREASE IN AGE LIMIT

When the original Act was enacted in 1967, it covered persons at least 40 years old and under the age of 65. The original bill had covered the ages 45-65, but the age of initial coverage was lowered because of evidence that age discrimination began about the age of 40. There was almost no discussion as to why the upper age limit was set at 65.

Senator Young (D-Ohio), however, complained that setting 65 as an arbitrary age for forced retirement was an "outmoded" concept. He observed that the view that a 65-year-old worker was so old as to warrant compulsory retirement came from an era when life expectancy was much shorter than it had become. The concept of retirement at 65 came from German Chancellor Otto Von Bismarck in 1887, Sen. Young stated. Bismarck fixed 65 as the age when retirement benefits would begin under the German social security system. Sen. Young observed that life expectancy had become twice that of people at the time of the establishment of Germany's social security system. He urged that there be no arbitrary retirement age at all. (Congressional Record, p. 31256, November 6, 1967)

In its July 25, 1977 report urging the approval of an increase in the age of coverage to 70, the House Education and Labor Committee stated: "The upper age cutoff of 65 was originally selected because it was a customary retirement age and the age at which many public and private pension benefits became available—not for any scientific reason."

Some congressmen sought to eliminate an upper age limit entirely. The age of 70 was selected as a compromise between not changing the original limit of 65 and removing the limit altogether. Section 7 of the Age Act Amendments directs the Secretary of Labor to undertake a study of the effects of raising the upper age limitation to 70. The study is to be completed within

three years after the effective date of the increase in the age limitation to 70, which is January 1, 1979, and an interim report is to be delivered by January 1, 1981. The study is to focus on the effects of the increase to age 70 and the feasibility of raising the limit beyond age 70.

A number of states that have laws forbidding age discrimination do not set up upper age limit on this protection. A federal district court has ruled that Alaska's Fair Employment Practice Act is not invalid as constituting an unreasonable restraint on interstate commerce, even though the Alaska Act contains no maximum age of coverage. The court also rejected a contention that the Age Discrimination in Employment Act (ADEA) preempted such a state law to the extent that the state law is broader in coverage than the ADEA; it stated that Congress intended to set only "minimum" standards in the ADEA. Simpson v. Providence Washington Insurance Group, 423 F.Supp. 552, 13 FEP Cases 1779 (DC Alas 1976).

During the Senate debate, Senators Javits (R-NY) and Williams (D-NJ) engaged in the following colloquy:

"Mr. Javits: Finally, Mr. President, it is understood that just as these age discrimination amendments do not interfere with ERISA, State age discrimination in employment laws also are not to interfere with ERISA. * * * the preemption rules of section 514(a) of ERISA shall be determinative regarding the preemption of State age discrimination laws which directly or indirectly establish requirements relating to employee benefit plans. ERISA's preemption of state age discrimination laws shall be determined without regard to section 514(d) of ERISA or the fact that the ADEA does not itself preempt State law.

"Mr. Williams: I concur in my friend's observations as they accurately state the controlling principles of law in this regard. Federal law will preempt State age discrimination statutes only to the extent that those laws relate to an employee benefit plan described in section 4(a) of ERISA." (Cong. Record, March 23, 1978, S4451)

II. MANDATORY RETIREMENT

The change in the provision concerning mandatory retirement is the most important part of the legislation. Under the original Act, an employer was permitted, without regard to age, "to observe the terms of a bona fide seniority system or any employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of the Act, except that no such employee benefit plan shall excuse the failure to hire any individual."

This provision permitted the employer to retire an employee below the age of 65 so long as a pension or retirement plan provided for early retirement and the employer was merely observing the plan. This interpretation was confirmed by the U.S. Supreme Court's recent decision in United Air Lines v. McMann, 16 FEP Cases 146 (December 12, 1977). The Court ruled that a bona fide retirement plan established before the enactment of the Age Discrimination Act could not be a "subterfuge" to evade the purposes of the Act. In holding that the employer could observe a provision of its retirement plan that permitted it to retire an employee at age 60, the Court stated that it could find nothing in the language of the Act "to indicate Congress intended wholesale invalidation of retirement plans instituted in good faith before its passage, or intended to require employers to bear the burden of showing a business or economic purpose to justify bona fide pre-existing plans."

Now the amended Act forbids the involuntary retirement of an employee below the age of 70 pursuant to the terms of a seniority system or employee benefit plan. This prohibition takes effect upon the President's signature, but employees who are covered by a collective bargaining contract that was in effect on September 1, 1977 are not protected until either the contract expires or January 1, 1980, whichever occurs first. The Conference Committee Report states that the purpose of the amendment is to overturn the McMann ruling exempting retirement plan provisions that were in effect before 1967 from the prohibition against age discrimination.

Exemption for High-Paid Executives

However, an employer may force the retirement of a 65-year-old employee if he has been employed, for the two-year period immediately before retirement, in a "bona

fide executive or a high policymaking position" and if he is entitled to an immediate nonforfeitable pension of at least $27,000 per year. The amendments and the Conference Committee Joint Explanation provide the following explanations:

- In determining whether an employee is covered by this exception, his pension benefits are to be adjusted if they are in a form other than a straight life annuity with no ancillary benefits or if he contributed to the retirement plan or made rollover contributions. The employee is not covered if his adjusted pension benefits are not the equivalent of a $27,000 straight life annuity with no ancillary benefits under a plan to which employees do not contribute and under which no rollover contributions are made.

- The House bill provided for an annual adjustment by the Secretary of Labor of the retirement income test based on changes in the cost of living. This provision was eliminated in conference.

- The definition of bona fide executive under the Fair Labor Standards Act is intended to be a guideline for determining those employees who meet the definition of executive, the Conference Committee report states. However, because that definition is too broad, the Conference Committee also wrote that an employee who is a bona fide executive would not be exempt from the Act unless he fell within certain examples mentioned in the report. Included in the examples are (1) the head of a significant and substantial local or regional operation of an employer, but not the head of a minor branch, warehouse, or retail store; (2) individuals at higher levels who possess "comparable or greater levels of responsibility and authority as measured by established and recognized criteria"; and (3) the immediate subordinates of the heads of divisions of a large organization if these subordinates possess responsibility that is comparable to or greater than that possessed by the head of a significant and substantial local operation who meets the definition.

- High policymaking employees who are not bona fide executives are within the exemption if their position and responsibility are such that they play a significant role in the development and implementation of corporate policy.

- The exemption for bona fide executive or high policymaking employees takes effect on January 1, 1979.

In addition, colleges and universities may compel tenured faculty to retire at age 65. This exemption is scheduled to end, however, on July 1, 1982.

The United States Government has had a mandatory retirement age of 70 for most of its employees. An amendment to the ADEA eliminates this age limitation effective as of September 30, 1978. However, this amendment does not affect those employees who are employed in positions for which a retirement age is established by statute.

Post-65 Pension Benefit Credits

While the bill to raise the mandatory retirement age to 70 was pending in the Senate, a number of questions arose concerning the relationship between the ADEA as amended and the Employee Retirement Income Security Act (ERISA). In a letter to the Senate Committee on Human Resources, the Assistant Secretary of Labor for Employment Standards, Donald Elisburg, made the following statements:

- "It is our view that nothing in the ADEA or in the proposed amendments would require an employer to credit, for purposes of benefit accrual, those years of service which occur after an employee's normal retirement age. ERISA likewise does not require such accrual."

- An employer would not be required to pay the actuarial equivalent of normal retirement benefits to an employee who continues to work beyond the normal retirement age.

- "[A] bona fide pension plan that provides that no benefits accrue to a participant who continues service with the employer after attainment of normal retirement age would not violate the ADEA."

During the Senate debate, Senator Williams (D-NJ) referred to the Elisburg letter and commented that it makes clear that "employers will not be required to continue contributions to either defined benefit or defined contribution plans for employees who continue working beyond a plan's normal retirement age. (Cong. Record, p. S4450, March 23, 1978)

There is no language in the ADEA

amendments regarding the relationship of the ADEA to ERISA or the right of an employer to deny employee pension benefit credit for time worked after normal retirement age (usually age 65) and age 70. Litigation concerning this matter is possible.

Benefit Levels for Older Workers

During the Senate debate, Senator Javits made the following observations regarding employer practices with respect to employee benefit plan costs:

"Some employers are concerned that the 1978 amendments may increase costs for employee welfare benefit plans, such as life, health, and disability programs. The Senate report notes that some plans currently reduce coverage for older workers or increase the required employee contribution as workers advance in age.

"I want to emphasize that these amendments do not change present law regarding these practices. As the Senate report states:

" 'Existing principles of law, including the section 4(f)(2) bona fide employee benefit plan exception, as modified by these amendments would be the standard by which these practices will be evaluated.'

"The purpose of Section 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers as compared to younger workers.

"Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers. Thus a retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits or insurance coverage."

III. PROCEDURE

The amendments also make procedural changes that affect the way an ADEA claim is processed and tried, and the Conference Committee report contains language bearing on the remedies that are available to a discriminatee.

A. *Jury Trial*

The original Act did not indicate whether a jury trial was available in an action under the ADEA. Two schools of thought developed. The first took the position that the Act was modeled after Title VII of the Civil Rights Act of 1964, which prohibits racial, national origin, sex, and religious discrimination and which has been interpreted as not providing for a jury trial on the ground that the relief obtained under it is "equitable" in nature. Cases taking this position included Morelock v. NCR Corporation, 546 F.2d 682, 14 FEP Cases 65 (CA 6, 1976); Platt v. Burroughs Corp., 424 F.Supp. 1329, 14 FEP Cases 1057 (DC EPa 1976); Polstorff v. Fletcher, 430 F.Supp. 592, 14 FEP Cases 1638 (DC NAla 1977); and Travers v. Corning Glass Works, 76 F.R.D. 431, 15 FEP Cases 584 (DC SNY, 1977) (Weinfeld J.).

However, most courts ruled that an ADEA plaintiff could have a jury trial, at least on certain issues that are "legal" in nature. See, for example, Chilton v. National Cash Register Co., 370 F.Supp. 660, 7 FEP Cases 203 (DC SOhio 1974); Murphy v. American Motors Sales Corp., 410 F.Supp. 1403, 12 FEP Cases 1090 (DC NGa 1976); Cleverly v. Western Electric Co., 69 F.R.D. 648, 13 FEP Cases 1443 (DC WMo 1975); Bertrand v. Orkin Exterminating Co., 419 F.Supp. 1123, 13 FEP Cases 1447 (DC NIll 1976); Rogers v. Exxon Research & Engineering Co., 550 F.2d 834, 14 FEP Cases 518 (CA 3, 1977); Fellows v. Medford Corp., 431 F.Supp. 199, 14 FEP Cases 1156 (DC Ore 1977); and Rechsteiner v. Madison Fund, Inc., 75 F.R.D. 499, 15 FEP Cases 216 (DC Dec 1977).

The Supreme Court resolved this dispute under the original Act on February 22, 1978. The Court said unanimously that a jury trial is available in a private ADEA action for lost wages. It found that Congress had intended the ADEA to be enforced in accordance with the procedures of the Fair Labor Standards Act, which provides the right to a jury trial, rather than pursuant to Title VII. The Court also noted that the ADEA empowers a federal district court to grant "legal" relief, and it said that the Seventh Amendment to the U.S. Constitution provides the right to a jury trial in cases in which legal relief may

be afforded. Lorillard v. Pons, 16 FEP Cases 855 (1978), aff'g 549 F.2d 950, 14 FEP Cases 612 (CA 4, 1977).

The Age Act Amendments add a jury trial provision to the ADEA. This provision grants private persons a jury trial "of any issue of fact" in an ADEA action for recovery of "amounts owing" as a result of a violation of the Act. It does not matter that equitable relief such as an injunction or reinstatement is being sought in the action.

The Conference Committee report elaborates on this amendment. The report points out that the phrase "amounts owing" encompasses two things:

- Items of pecuniary or economic loss such as wages, and fringe and other job-related benefits; and
- Liquidated damages, which are calculated as an amount equal to the pecuniary loss and which compensate the discriminatee for nonpecuniary losses arising out of a willful violation of the ADEA.

The report notes that the Supreme Court did not decide in Pons v. Lorillard whether there is a right to a jury trial on a claim for liquidated damages. The report states that liquidated damages are in the nature of legal relief and that therefore the factual issues underlying a claim for such a remedy should be triable by jury. The Conference Committee takes note of the Supreme Court's decision in Overnight Transportation Co. v. Missel, 316 U.S. 572, 2 WH Cases 47 (1942), that an award of liquidated damages under the Fair Labor Standards Act (the procedures of which generally govern ADEA actions) is not a penalty but rather is available to provide full compensatory relief for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages."

The conference report states: "The ADEA as amended by this Act does not provide remedies of a punitive nature." Courts have divided over this question. A majority of them has held that punitive damages may not be recovered in an ADEA action, because of the Act's provision for liquidated damages and its silence as to the question of punitive damages. This was the view taken by the only appellate court decision on the subject. Dean v. American Security Insurance Co., 559 F.2d 1036, 15 FEP Cases 889 (CA 5, 1977).

Compensatory Damages

Courts have also divided on the question of whether compensatory damages for pain and suffering may be awarded under the ADEA. The case that is most frequently cited is Rogers v. Exxon Research & Engineering Co. The district court held that compensatory damages could be recovered under the Act for pain and suffering, since "[T]he most pernicious effect of age discrimination is not to the pocketbook, but to the victim's self-respect. . . . [T]he out-of-pocket loss occasioned by such discrimination is often negligible in comparison to the physiological and psychological damage caused by the employer's unlawful conduct." 404 F.Supp. 324, 11 FEP Cases 776, 779 (DC NJ 1975).

The Third Circuit reversed. It pointed out that the legislative history of the Act did not indicate congressional support for the recovery of compensatory damages. The court further stated that the availability of such a remedy would impair the conciliation process. It explained that the possibility of recovering a large verdict for pain and suffering would make a claimant less than enthusiastic about accepting a settlement for only his out-of-pocket loss. 550 F.2d 834, 14 FEP Cases 518 (CA 3, 1977).

However, a number of other courts rejected the appeals court analysis in Rogers in favor of that of the district court. See, e.g., Bertrand v. Orkin Exterminating Co., 432 F.Supp. 952, 15 FEP Cases 21 (DC NIll 1977), and Coates v. National Cash Register Co., 433 F.Supp. 655, 15 FEP Cases 222 (DC WesternVa 1977). Through the FEP CASES issue of April 1, 1977, there have been 22 reported decisions on the subject; 13 of them, including two by appeals courts, have ruled against the availability of compensatory damages under the ADEA.

The Conference Committee report's reference to the Supreme Court's explanation of the purposes of liquidated damages may indicate a congressional intent that courts not award compensatory damages to victims of age discrimination.

B. *Tolling of the Statute of Limitations During Conciliation*

The original Act contained no provision for tolling the statute of limitations while the Secretary of Labor attempted conciliation. An individual who filed a notice of intent to sue with the Secretary was required to wait 60 days after filing the notice before he could bring suit, and the lawsuit had to be brought within two years after the alleged discriminatory act. The limitations period was three years if a willful violation was alleged.

Now Congress has added a section providing for the tolling of the limitations period for up to one year while the Secretary attempts to effect voluntary compliance with the ADEA. This provision takes effect with respect to conciliations begun by the Secretary after the enactment of the Age Act amendments. The Conference Committee report states that the tolling will begin when the Labor Department states in a letter to the prospective defendant that it is prepared to start conciliation efforts.

Some courts have stated that conciliation is a jurisdictional prerequisite to an ADEA action brought by the Secretary of Labor. See, e.g., Dunlop v. Resource Sciences Corp., 410 F.Supp. 836, 15 FEP Cases 38 (DC NOkla 1976); and Usery v. Sun Oil Co. (Delaware), 423 F.Supp. 125, 15 FEP Cases 591 (DC NTex 1976).

However, the Conference Committee report states: "The conferees wish to make clear that conciliation is not a jurisdictional prerequisite to maintaining a cause of action under the Act." The reports cites the Eighth Circuit's decision in Brennan v. Ace Hardware Corp., 495 F.2d 368, 7 FEP Cases 657 (CA 8, 1974), aff'g 362 F.Supp. 1156, 6 FEP Cases 145 (DC Neb 1973) as reflecting a "proper understanding" of the conciliation requirement. The court there rejected the employer's argument that the requirement is a "condition precedent to the court entertaining jurisdiction of the legal action." The report points out that the Eighth Circuit correctly noted that district courts have the equitable jurisdiction to stay lawsuits pending before them to permit completion of conciliation efforts before the lawsuit continues.

The Eighth Circuit found that the district court's refusal to stay proceedings to permit further conciliation efforts was not an abuse of discretion. However, several other courts have stayed proceedings. Brennan v. Texas Instruments, 12 FEP Cases 1724 (DC EKy 1976); and Dunlop v. Sandia Corp., 13 FEP Cases 128 (DC NM 1975), where the court said that to conciliate meaningfully, the Secretary of Labor should both demonstrate the validity of his claim notwithstanding the fact that the data are available to the employer in its own files and respond in some way to the employer's contentions. One district court has ruled that an apparent failure by the Secretary to attempt conciliation after receiving a timely notice of intent to sue would not bar a discharged employee from bringing his own action against an employer. Lundgren v. Continental Industries, Inc., 14 FEP Cases 58 (DC NOkla 1976); see also Woerner v. Bell Helicopter, 16 FEP Cases 480 (DC NTex 1977).

C. *Notice Requirements*

The original Act required an aggrieved person to file a notice of intent to sue with the Secretary of Labor within 180 days after the alleged act of discrimination (or 300 days if a claim was filed with a state authority having the power to grant or seek relief for age discrimination). After filing the notice of intent to sue, the aggrieved person was required to wait 60 days before filing suit so that the Secretary would have an opportunity to attempt conciliation of his claim.

Numerous problems developed with this requirement. The first was that the courts strictly construed the concept of a notice of intent to sue. A generalized complaint of age discrimination was not enough to meet the requirement, it was held. (See, e.g., Powell v. Southwestern Bell Telephone Co., 494 F.2d 485, 8 FEP Cases 1 (CA 5, 1974); Hiscott v. General Electric Co., 521 F.2d 632, 11 FEP Cases 292 (CA 6, 1975); cases cited in Davis v. RJR Foods, Inc., 420 F.Supp. 930, 14 FEP Cases 1150, 1151 (DC SNY 1976), affirmed without published opinion 556 F.2d 555, 15 FEP Cases 1369 (CA 2, 1977), and Enos v. Kaiser Industries Corp., 16 FEP Cases 725, 727 (DC DC 1978).

Frequently, the situation arose where the aggrieved person learned too late of the 180-day requirement, and the question became whether the period was tolled until he learned that he had specifically to say

posting of the Labor Department notice could not rely on the failure of the notice to be posted as tolling the running of the 180-day period.

Charge Requirement

The Senate voted to deal with the problems of the 180-day filing requirement by eliminating it. An aggrieved person would have to give 60 days' notice of intent to sue to the Secretary, but this notice could be given at any time. The House did not enact any comparable provision. The Conference Committee decided to keep the 180-day time limitation (and 300 days for persons in states with state age discrimination laws). However, the requirement of a "notice of intent to sue" is changed to one of a "charge." The change in language is not designed to alter the basic purpose of the notice requirement, which is to provide the Labor Department with sufficient information so that it may notify all persons named in the charge as prospective defendants and attempt conciliation, the Conference Committee report says. It states that "the conferees intend that the 'charge' requirement will be satisfied by the filing of a written statement which identifies the potential defendant and generally describes the action believed to be discriminatory." The change is designed to eliminate the dispute over whether a claim of age discrimination is adequate to meet the 180-day filing requirement. It also appears that an oral complaint will not be sufficient to meet the requirement, although it remains to be seen whether a statement taken down by a Labor Department official while an aggrieved person is making an oral complaint would be found to meet the requirement of a "written statement."

The Conference Committee report also attempts to resolve a question left open when the Supreme Court divided 4-4 in its ruling on the Dartt case. The report states: "The conferees agree that the 'charge' requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and that therefore equitable modification for failing to file within the time period will be available to plaintiffs under the Act." At this point, the report cites the Dartt, Bonham, and Charlier appeals court decisions. This indicates that an employer's failure to post the required notice may excuse an employer's failure to file a timely charge with the Secretary of Labor.

Resort to State Authority

The courts have been vexed by another procedural problem. Section 14(b) of the Act provides that where an alleged unlawful practice occurs in a state that has a law forbidding age discrimination and establishing or authorizing a state authority to grant or seek relief from such alleged discriminatory practice, no action may be brought under the ADEA "before the expiration of sixty days after proceedings have been commenced under State law, unless such proceedings have been earlier terminated." This language is ambiguous as to whether an aggrieved person must resort to the state authority before proceeding under the ADEA. It could be interpreted as meaning only that if he does file a claim with the state authority, the state authority must be given 60 days to resolve the dispute without federal interference.

There have been at least 43 reported court decisions wrestling with this language. In general, courts have taken one of three positions on the question: Filing with the state is a jurisdictional prerequisite (See cases collected in Enos v. Kaiser Industries Corp., supra, 16 FEP Cases at 726-727.), the failure to file with the state may be excused under certain circumstances (Griffin v. First Pennsylvania Bank, 17 FEP Cases 54 (DC EPa 1977), or an aggrieved person need not file with the state at all (Vazquez v. Eastern Air Lines, 405 F.Supp. 1353, 12 FEP Cases 686 (DC PR 1975)). The Eastern District of Michigan has issued eight opinions on the subject by six judges, and there is little agreement among them. (Compare Vaughn v. Chrysler Corp., 382 F.Supp. 143, 10 FEP Cases 621 (1974); Rucker v. Great Scott Supermarkets, Inc., 11 FEP Cases 473 (1974), affirmed 528 F.2d 393, 12 FEP Cases 370 (CA 6, 1976); McGhee v. Ford Motor Co., 15 FEP Cases 869 (1976); Gabriele v. Chrysler Corp., 416 F.Supp. 666, 15 FEP Cases 870 (1976); and Graham v. Chrysler Corp., 15 FEP Cases 876 (1976); with Bertsch v. Ford Motor Co., 415 F.Supp. 619, 15 FEP Cases 880 (1976); and with Magalotti v. Ford Motor Co., 418 F.Supp. 430, 15 FEP Cases 877 (1976); and Nickel v. Shatter-

that he intended to bring suit. Although some courts termed compliance with the 180-day requirement a "jurisdictional prerequisite" to bringing an action, a majority of courts regarded the 180-day period as a statute of limitations that could be tolled for equitable reasons. See, e.g., Dartt v. Shell Oil Co., 539 F.2d 1256, 13 FEP Cases 12 (CA 10, 1976), affirmed by an equally divided Supreme Court, 16 FEP Cases 146 (1977); Bonham v. Dresser Industries, Inc., 16 FEP Cases 510 (CA 3, 1977) and Abbott v. Moore Business Forms, 439 F.Supp. 643, 15 FEP Cases 1584 (DC NH 1977).

Starting Date

Another problem involved the date on which the 180-day period began to run. The Eighth Circuit took the position that the period should begin to run on the day that an employee officially was terminated for administrative purposes rather than the day that he was notified of his discharge. Moses v. Falstaff Brewing Corp., 525 F.2d 92, 11 FEP Cases 828 (CA 8, 1975). This decision was followed in Marshall v. Kimberly-Clark Corp., 15 FEP Cases 690 (DC NGa 1977), which held that the 180-day period began to run on the day that the employer ended its payment of severance pay to a former employee, rather than on the date three months earlier when it stopped his salary.

However, other courts refused to follow such an analysis. One court ruled that the period began to run when an employee received notice of his termination and stopped work, not when he stopped receiving the benefits of employment. Davis v. RJR Foods, Inc., supra. The Fifth Circuit said that the period began to run when an employer, by acts or words, shows a clear intention to dispense with the services of an employee and the services of the employee are no longer accepted. Payne v. Crane Co., 560 F.2d 198, 16 FEP Cases 516 (CA 5, 1977). The Third Circuit followed the Davis and Payne decisions in Bonham v. Dresser Industries, Inc., supra.

A third problem confronting the courts concerned the form of the communication between the aggrieved party and the Secretary of Labor. Would an oral notice of intent to sue be sufficient to meet the notice requirement? Some courts found this acceptance in view of the remedial nature of the statute and the lack of sophistication of many aggrieved persons, see, e.g., Woodford v. Kinney Shoe Corp., 369 F.Supp. 911, 7 FEP Cases 117 (DC NGa 1973); Sutherland v. SKF Industries, Inc., 419 F.Supp. 610, 14 FEP Cases 512 (DC EPa 1976); and Noto v. JFD Electronics Corp., 16 FEP Cases 1044 (DC ENC 1978), whereas others have taken the position that the statutory requirement of filing a notice of intent to sue can mean only a written notice, see, e.g., Hughes v. Beaunit Corp., 12 FEP Cases 1564 (DC ETenn 1976); Berry v. Crocker National Bank, 13 FEP Cases 673 (DC NCalif 1976); and Enos v. Kaiser Industries, Inc., supra.

Failure to Post Notice

A further problem considered by a number of courts concerned a claim that the employer did not post the required notice from the Labor Department informing employees of their rights under the ADEA. Many courts took the position that the employer's alleged failure did not excuse the untimeliness of the employee's conduct, since they took the view that a timely notice of intent to sue was a jurisdictional prerequisite to suit. See, e.g., Hiscott v. General Electric Co., supra; and Brohl v. Singer Co., 407 F.Supp. 936, 12 FEP Cases 541 (DC MFla 1976). But three courts of appeals have ruled that an employer's failure to post the Labor Department notice may be cause for tolling the 180-day period. Dartt v. Shell Oil Co., supra; Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761, 15 FEP Cases 421 (CA 5, 1977); and Bonham v. Dresser Industries, Inc., supra. But even courts that have recognized the failure to post as tolling the 180-day period have not applied this concept in every situation. In Skoglund v. Singer Co., 13 FEP Cases 253 (DC NH 1975), a federal district court that had said that the failure to post would excuse noncompliance with the 180-day requirement refused to permit a store manager to rely on the alleged failure to post, where it was one of his duties to be familiar with antidiscrimination laws. (In addition, the court found that the notice was in fact posted.) In Adams v. Federal Signal Corp., 559 F.2d 433, 15 FEP Cases 1094 (CA 5, 1977), the Fifth Circuit found that a former employee whose responsibilities included the

proof Glass Corp., 424 F.Supp. 884, 15 FEP Cases 1099 (1976)).

The Gabriele case held that it is immaterial that the time for filing with the state is shorter than the time provided by the ADEA for filing with the Secretary of Labor. The Bertsch and Nickel cases found, to the contrary, that when the period provided for filing under the state law is substantially shorter than the period provided for filing under the ADEA, an ADEA action should not necessarily be dismissed because the agrieved person filed too late with the state authority.

There is also a division in the courts as to whether the Secretary of Labor is required to file a claim with a state before bringing his own action. One court ruled that Section 14(b) does not apply to the Secretary (Dunlop v. Crown Cork & Seal Co., 405 F.Supp. 774, 11 FEP Cases 1446 (DC Md 1976), but two courts have dismissed actions brought by the Secretary for failure to follow the section (Usery v. West Essex General Hospital, 15 FEP Cases 1130 (DC NJ 1977); and Marshall v. Chamberlain Mfg. Corp., 443 F.Supp. 159, 16 FEP Cases 31 (DC WPa 1977)).

Senate Discussion

There is no language in the ADEA amendments dealing with any of these problems. However, the Conference Committee report notes a discussion of the state deferral provision in the Senate Report and adopts this discussion. In this discussion, the Senate Human Resources Committee stated that the ADEA did not preempt state laws dealing with age discrimination. It noted, however, that under Section 14(a) of the ADEA, the commencement of an action under the ADEA would require a previously filed state age discrimination lawsuit to be held in abeyance while the ADEA action was being litigated, unless it was determined that the two actions were not conterminous in nature.

With respect to Section 14(b), the Senate Report states:

"Section 14(b) of the Act provides that where an action of discrimination occurs in a State which has an age discrimination law and an agency empowered to grant or seek relief from such discriminatory practices, no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been commenced under State law, unless such proceedings have been earlier terminated. This provision requires that if the individual chooses to apply first to the State agency for relief he must give the State the prescribed minimum period in which to take remedial action before he may turn to the federal courts for relief under the ADEA. The provision does not require that the individual go to the State first in every instance.

"Several courts have properly recognized the distribution. [The Report cites Smith v. Jos. Schlitz Brewing Co., 419 F.Supp. 770, 12 FEP Cases 1494 (DC NJ 1976); Vazquez v. Eastern Air Lines, supra; Bertrand v. Orkin Exterminating Co., 419 F.Supp. 1123, 13 FEP Cases 1447 (DC NIll 1976); and Judge Garth's concurring opinion in Goger v. H.K. Porter Co., 492 F.2d 13, 17-18, 7 FEP Cases 71, 73-74 (CA 3, 1974).]

"Other courts, however, have ruled that the complainant must go initially to the State authorities in every instance, and that the failure to do so requires dismissal of the federal action. [The Report cites Vaughn v. Chrysler Corp., supra, Smith v. Crest Communities, Inc., 8 FEP Cases 1328 (DC WKy 1974); Fitzgerald v. New England Tel. & Tel. Co., 416 F.Supp. 617, 12 FEP Cases 1780 (DC Mass 1976); and the majority opinion in Goger v. H.K. Porter Co., supra.]

"It is the committee's view that an individual who has been discriminated against because of age is free to proceed either under state law or under federal law. The choice is up to the individual. However, as Section 14(b) makes clear, if the individual does choose to proceed initially under State law, he must give the State agency at least 60 days to take remedial action before he may commence a federal action."

This language will provide fodder for a litigant who seeks to argue in court that he was not required to proceed before the state authority before bringing his ADEA action. It is not necessarily clear, however, that the courts will follow the interpretation set forth in the Senate Report.

The problem is that Congress did not reenact Section 14 when it voted to amend the Age Act. When Congress amended Title

VII of the 1964 Civil Rights Act in 1972, it made various changes and then noted in the Conference Report that "[i]n any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII."

While this language was cited with favor by the Supreme Court in Franks v. Bowman Transportation Co., 424 U.S. 747, 12 FEP Cases 549, 556 n. 21 (1976), it shortly thereafter rejected the unanimous position of the courts of appeals that it is a violation of Title VII for an employer to maintain a seniority system that perpetuates the effects of past discrimination. See Teamsters v. U.S., 431 U.S. 324, 14 FEP Cases 1514, 1526-1527 n. 39 (1977).

IV. CONCLUSION

The Age Act amendments are designed to accomplish three things: protect employees above the age of 65 from age discrimination, outlaw mandatory retirement on the basis of age for almost everyone below the age of 70, and clarify procedural matters that have been before the Supreme Court.

There is a possibility that the ban on mandatory retirement may have an ironic effect on employees not near retirement age. The ban will not preclude an employer from terminating an employee for cause; an employee who is incompetent or unable to perform his job is not protected by the Act from being discharged or retired.

It appears that many employers have tolerated less than acceptable work behavior from older employees who were near retirement age under an early retirement program that could be used to force these employees to retire. This option has been cut off for employers by the ADEA amendments.

To retire or terminate an older employee will require evidence that would stand up in court that the employee was not performing properly, so that the employer can demonstrate that it was not acting on the basis of age. To obtain this evidence, many employers will have to make their program for evaluating employees more honest; they may have to raise their standards. However, if an employer were to evaluate only its older employees under its more severe standards, this would amount to age discrimination—because the older employees would be singled out because of their age.

Consequently, it would appear that the employer would have to evaluate all of its employees, young as well as old, under its new standards to avoid a charge of age discrimination. Applying these new standards to all of the employees could lead to the termination of more younger employees than would have been the case before the Age Act was amended.

95TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 95-950

AGE DISCRIMINATION IN EMPLOYMENT ACT AMENDMENTS OF 1978

MARCH 14, 1978.—Ordered to be printed

Mr. PERKINS, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 5383]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 5383) to amend the Age Discrimination in Employment Act of 1967 to extend the age group of employees who are protected by the provisions of such Act, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

SHORT TITLE

SECTION 1. This Act may be cited as the "Age Discrimination in Employment Act Amendments of 1978".

SENIORITY SYSTEMS AND EMPLOYEE BENEFIT PLANS

SEC. 2. (a) Section 4(f)(2) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(f)(2)) is amended by inserting after "individual" a comma and the following: "and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual".

(b) The amendment made by subsection (a) of this section shall take effect on the date of enactment of this Act, except that, in the case of employees covered by a collective bargaining agreement which is in effect on September 1, 1977, which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938), and which would otherwise be prohibited by the amendment made by section 3(a) of this Act, the amendment made by subsection (a) of this section shall take effect upon the termination of such agreement or on January 1, 1980, whichever occurs first.

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APPLICATION OF AGE LIMITATION

SEC. 3. (a) Section 12 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631) is amended to read as follows:

"AGE LIMITATION

"SEC. 12. (a) The prohibitions in this Act shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

"(b) In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 15 of this Act, the prohibitions established in section 15 of this Act shall be limited to individuals who are at least 40 years of age.

"(c)(1) Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profitsharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in aggregate, at least $27,000.

"(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Secretary, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

"(d) Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1201(a) of the Higher Education Act of 1965).".

(b)(1) Sections 12(a), 12(c), and 12(d) of the Age Discrimination in Employment Act of 1967, as amended by subsection (a) of this section, shall take effect on January 1, 1979.

(2) Section 12(b) of such Act, as amended by subsection (a) of this section, shall take effect on September 30, 1978.

(3) Section 12(d) of such Act, as amended by subsection (a) of this section, is repealed on July 1, 1982.

ENFORCEMENT PROCEDURE

SEC. 4. (a) Section 7(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(c)) is amended by inserting "(1)" after the subsection designation and by adding at the end thereof the following new paragraph:

"(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act,

regardless of whether equitable relief is sought by any party in such action.".

(b)(1) Section 7(d) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(d)) is amended to read as follows:

"(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—

"(1) within 180 days after the alleged unlawful practice occurred; or

"(2) in a case to which section 14(b) applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.".

(2) The amendment made by paragraph (1) of this subsection shall take effect with respect to civil actions brought after the date of enactment of this Act.

(c)(1) Section 7(e) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(e)) is amended by inserting "(1)" after the subsection designation and by adding at the end thereof the following new paragraph:

"(2) For the period during which the Secretary is attempting to effect voluntary compliance with requirements of this Act through informal methods of conciliation, conference, and persuasion pursuant to subsection (b), the statute of limitations as provided in section 6 of the Portal-to-Portal Act of 1947 shall be tolled, but in no event for a period in excess of one year.".

(2) The amendment made by paragraph (1) of this subsection shall take effect with respect to conciliations commenced by the Secretary of Labor after the date of enactment of this Act.

FEDERAL GOVERNMENT EMPLOYMENT

SEC. 5. (a) Section 15(a) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(a)) is amended by inserting "who are at least 40 years of age" after "applicants for employment" and by inserting "personnel actions" after "except".

(b)(1) Section 3322 of title 5, United States Code, relating to temporary appointments after age 70, is repealed.

(2) The analysis for chapter 33 of title 5, United States Code, is amended by striking out the item relating to section 3322.

(c) Section 8335 of title 5, United States Code, relating to mandatory separation, is amended—

(1) by striking out subsections (a), (b), (c), (d), and (e) thereof;

(2) by redesignating subsections (f) and (g) as subsections (a) and (b), respectively; and

(3) by adding after subsection (b), as so redesignated, the following new subsections:

"(c) An employee of the Alaska Railroad in Alaska and an employee who is a citizen of the United States employed on the Isthmus of Panama by the Panama Canal Company or the Canal Zone Government, who becomes 62 years of age and completes 15 years of service in Alaska or on the Isthmus of Panama shall be automatically separated from the service. The separation is effective on the last day of the month in which the employee becomes age 62 or completes 15 years of service in Alaska or on the Isthmus of Panama if then over that age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.

"(d) The President, by Executive order, may exempt an employee from automatic separation under this section when he determines the public interest so requires".

(d) Section 8339(d) of title 5, United States Code, relating to computation of annuity, is amended by striking out "section 8335(g)" and inserting in lieu thereof "section 8335(b)".

(e) Section 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a) is amended by adding at the end thereof the following new subsections:

"(f) Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Act, other than the provisions of section 12(b) of this Act and the provisions of this section.

"(g)(1) The Civil Service Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 12(b) of this Act, as added by the Age Discrimination in Employment Act Amendments of 1978.

"(2) The Civil Service Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.".

(f) The amendments made by this section shall take effect on September 30, 1978, except that section 15(g) of the Age Discrimination in Employment Act of 1967, as amended by subsection (e) of this section, shall take effect on the date of enactment of this Act.

REPORT BY SECRETARY OF LABOR

SEC. 6. (a)(1) Section 5 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 624) is amended by inserting "(a)(1)" after the section designation, and by adding at the end thereof the following new sentence: "Such study shall include—

"(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 12(a) of this Act to 70 years of age;

"(B) a determination of the feasibility of eliminating such limitation;

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"(C) a determination of the feasibility of raising such limitation above 70 years of age; and

"(D) an examination of the effect of the exemption contained in section 12(c), relating to certain executive employees, and the exemption contained in section 12(d), relating to tenured teaching personnel.".

(2) Section 5(a) of the Age Discrimination in Employment Act of 1967, as so redesignated by paragraph (1) of this subsection, as amended by adding at the end thereof the following new paragraph:

"(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.".

(b) Section 5 of the Age Discrimination in Employment Act of 1967, as amended by subsection (a) of this section, is further amended by adding at the end thereof the following new subsection:

"(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.".

AUTHORIZATION OF APPROPRIATIONS

SEC. 7. Section 17 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 635) is amended by striking out ", not in excess of $5,000,000 for any fiscal year,".

And the Senate agree to the same.

CARL D. PERKINS,
AUGUSTUS F. HAWKINS,
JOHN H. DENT,
EDWARD P. BEARD,
MICHAEL O. MYERS,
JOSEPH A. LE FANTE,
TED WEISS,
W. L. CLAY,
BALTASAR CORRADA,
CLAUDE PEPPER,
ALBERT H. QUIE,
RONALD A. SARASIN,
JAMES M. JEFFORDS,
C. PURSELL,
PAUL FINDLEY,
GLADYS NOON SPELLMAN,
(only for consideration of sections 4(c) and 5, relating to Federal Government employment, of the House bill),

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CEC HEFTEL (only for consideration of sections 4(c) and 5, relating to Federal Government employment, of the House bill),
ED DERWINSKI (only for consideration of sections 4(c) and 5, relating to Federal Government employment, of the House bill),
Managers on the Part of the House.

H. A. WILLIAMS,
JENNINGS RANDOLPH,
CLAIBORNE PELL,
GAYLORD NELSON,
DON RIEGLE,
EDWARD M. KENNEDY,
J. JAVITS,
DICK SCHWEIKER,
ROBERT STAFFORD,
JOHN H. CHAFEE,
Managers on the Part of the Senate.

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JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 5383) to amend the Age Discrimination in Employment Act of 1967 to extend the age group of employees who are protected by the provisions of such Act, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment struck out all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

BONA FIDE OCCUPATIONAL QUALIFICATION EXCEPTION

Senate amendment

The Senate amendment clarifies the meaning of section 4(f)(1) which provides that it is not unlawful to mandatorily retire an employee at an age less than the upper age limitation in the Age Discrimination in Employment Act of 1967 where the employer demonstrates that age is a bona fide occupational qualification.

The House bill

The House bill contains no comparable provision.

Conference agreement

The Senate recedes.

The conferees agree that the amendment neither added to nor worked any change upon present law.

PROHIBITION AGAINST MANDATORY RETIREMENT

Senate amendment

The Senate clarifies section 4(f)(2) of the act to prohibit the mandatory retirement of an employee within the protected age group pursuant to a bona fide employee benefit plan or seniority system which requires or permits such treatment.

House bill

The House bill is substantially the same.

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Conference agreement

House recedes to the Senate amendment.

The conferees agree that the purpose of the amendment to section 4(f)(2) is to make absolutely clear one of the original purposes of this provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age.

In *McMann* v. *United Airlines*, 98 S. Ct. 244 (1977), the Supreme Court held to the contrary, reversing a decision reached by the Fourth Circuit Court of Appeals, 542 F.2d 217 (1976). The conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments.

COLLECTIVE BARGAINING EXEMPTION

Senate amendment

The Senate amendment defers the effective date of the prohibition against mandatory retirement of persons 65 through 69 years of age if such retirement is required or permitted by bona fide employee benefit plans or seniority systems provided by collective bargaining agreements in effect on September 1, 1977. The effective date of the prohibition in these situations is the termination date of the collective bargaining agreement or January 1, 1980, whichever occurs first.

House bill

The House bill delays the effective date in such cases for collective bargaining agreements in effect at least 30 days before the date of enactment. The delay is for 2 years after the date of enactment or until the termination of such agreement, whichever occurs first.

Conference agreement

The House recedes.

BONA FIDE EXECUTIVE EXEMPTION

Senate amendment

The Senate amendment provides that certain high-level executives may be mandatorily retired between the ages of 65 and 70. The amendment includes in the exempted group those who are members of a select group of management or highly compensated employees who are entitled to an immediate nonforfeitable annual retirement benefit provided by the employer which is the equivalent of a straight life annuity equal to $20,000 per year, exclusive of social security, amounts attributable to employee contributions and contributions by prior employers. The Senate amendment provides that the Secretary of Labor shall annually adjust the retirement income amount to reflect increases or decreases in the cost of living. The amendment also authorizes the Secretary to develop regulations regarding the computation of the retirement income test.

House bill

The House bill contains no such provision.

Conference agreement

The House recedes with an amendment. To prevent an employer from circumventing the law by appointing an employee to a bona fide executive or high policymaking position shortly before retirement in order to permit compulsory retirement of that employee, the conference agreement provides that the exemption applies only to those employees who for the 2 years prior to retirement serve in such a capacity.

Under the conference agreement, the retirement income test is raised from $20,000 to $27,000 per year and the provision requiring the Secretary of Labor to make an annual adjustment for increases or decreases in the cost of living is eliminated. In calculating the retirement income figure, the conference agreement, like the Senate amendment, excludes amounts attributable to social security, employee contributions, and contributions of prior employers.

The phrase "bona fide executive or high policymaking position" is intended to clarify the class of employees covered by the Senate amendment. Concerns were expressed by the conferees that low-level managers, supervisors, or blue collar workers could be mandatorily retired under the Senate amendment. The conference agreement make clear that an employee will not be subject to mandatory retirement solely because he or she meets the retirement income test. The employee must also be a bona fide executive or high policymaking employee.

The definition of bona fide executive under the Fair Labor Standards Act of 1938 contained in 29 C.F.R. 541.1 is intended to be a guideline for determining those employees who meet the definition of executive for purposes of this amendment. However, that definition has been expansively interpreted, whereas the amendment is intended to cover only certain high level executives of employers who are subject to the provisions of the act. The conferees agree that to fail within the test the employee must be a bona fide executive as defined in 29 C.F.R. 541.1 and in addition meet the criteria described below. Although the examples used to describe such criteria refer to corporations, the conferees do not intend to exclude any covered employer.

Typically the head of a significant and substantial local or regional operation of a corporation, such as a major production facility or retail establishment, but not the head of a minor branch, warehouse or retail store, would be covered by the term "bona fide executive." Individuals at higher levels in the corporate organizational structure who possess comparable or greater levels of responsibility and authority as measured by established and recognized criteria would also be covered.

The heads of major departments or divisions of corporations are usually located at corporate or regional headquarters. With respect to employees whose duties are associated with corporate headquarters operations, such as finance, marketing, legal, production and manufacturing (or in a corporation organized on a productline basis, the management of product lines), the definition would cover employees who head those divisions.

In a large organization the immediate subordinates of the heads of these divisions sometimes also exercise executive authority, within the meaning of this exemption. The conferees intend the definition to cover such employees if they possess responsibility which is comparable to

or greater than that possessed by the head of a significant and substantial local operation who meets the definition.

The conferees added the term "high policymaking position" in order to assure that certain top level employees who are not "bona fide executives" under this amendment could nevertheless fall within the exemption. This group of employees is limited to those individuals who have little or no line authority but whose position and responsibility are such that they play a significant role in the development of corporate policy and effectively recommend the implementation thereof.

For example, the chief economist or the chief research scientist of a corporation typically has little line authority. His duties would be primarily intellectual as opposed to executive or managerial. His responsibility would be to evaluate significant economic or scientific trends and issues, to develop and recommend policy direction to the top executive officers of the corporation, and he would have a significant impact on the ultimate decision on such policies by virtue of his expertise and direct access to the decisionmakers. Such an employee would meet the definition of a "high policymaking" employee.

The conferees further agree that this exemption is not applicable to Federal employees covered by section 15 of the act.

COLLEGE AND UNIVERSITY FACULTY EXEMPTION

Senate amendment

The Senate amendment permits mandatory retirement of college and university faculty members between 65 and 70 years of age who are serving under a contract or similar arrangement which provides for unlimited tenure.

House bill

The House bill contains no comparable provision.

Conference agreement

The House recedes with an amendment which provides that this exemption is repealed on July 1, 1982.

The conferees agreed that this provision is not applicable to Federal employees covered by section 15 of the act.

RAISING THE UPPER AGE LIMITATION

Senate amendment

The Senate amendment raises the upper age limit of the act from 65 to 70 years of age effective January 1, 1979.

House bill

The House bill raises the upper age limit of the act from 65 to 70 years of age 180 days following the date of enactment.

Conference agreement

The House recedes.

REMOVING UPPER AGE LIMITATION FOR FEDERAL EMPLOYEES

House bill

The House bill amends section 12 of the act by eliminating the upper age limitation for most civilian Federal employees, but does not affect

certain Federal employees whose retirement is required or otherwise authorized by statute.

The House bill also makes it clear that section 15 of the act relating to Federal employees is independent of any other section of the act, except section 12(b) which contains the age limitation for Federal employees.

The House bill also requires the Civil Service Commission to study the effects of the amendments concerning Federal employees. The Commission is required to report its findings to the President and to the Congress no later than January 1, 1979.

Senate amendment

The Senate amendment contains no comparable provisions.

Conference agreement

The Senate recedes, with an amendment which provides that:

1. The effective date of the elimination of the upper age limit for Federal employees is September 30, 1978.

2. The Civil Service Commission study of the Federal employee provisions will be completed and transmitted no later than January 1, 1980.

REPORTS BY THE SECRETARY OF LABOR

Senate amendment

The Senate amendment requires the Secretary of Labor:

1. To conduct a study on the effect of raising the upper age limitation to age 70, the feasibility of raising the limitation above 70 years of age, and the feasibility of lowering the minimum age for coverage under the act;

2. Requires that an interim report be submitted no later than 2 years after the effective date, and that a final report be submitted no later than 3 years after such effective date; and

3. Provides that the Secretary of Labor may carry out the study directly, or by contract or other arrangement.

House bill

The House bill requires the Secretary of Labor.

1. To submit an interim report to the President and the Congress no later than 1 year after the effective date, and a final report no later than 2 years after such effective date; and

2. To conduct a study to determine the feasibility of eliminating the upper age limitation established in section 12(a) of the act.

Conference agreement

The House recedes with an amendment which:

1. Provides that the Secretary's interim report shall be submitted by January 1, 1981 and that the final report shall be submitted to Congress and to the President by January 1, 1982;

2. Provides that the study focus on the feasibility of eliminating the upper age limitation;

3. Strikes the requirement that the study focus on the feasibility of lowering the minimum age for coverage under the act, while retaining the requirement that the study focus on the effect of raising the age limitation to 70 and the feasibility of raising the age limitation above 70 years of age;

4. Requires the Secretary to examine the effect of the bona fide executive and tenured faculty exemptions and to make recommendations thereon; and

5. Requires the Secretary to complete the study required by section 5 of the act.

The conferees intend that the Secretary adopt the report and recommendation as his own whether or not it has been contracted out.

180-DAY NOTICE REQUIREMENTS

Senate amendment

The Senate amendment eliminates the requirement in section 7(d) of the act that an individual notify the Secretary of Labor before the commencement of a civil action no later than (1) 180 days after the alleged unlawful practice occurred; or (2) no later than 300 days after the occurrence of the alleged unlawful practice if the aggrieved individual chooses to commence proceedings before a State agency which is empowered by State law to grant or seek relief from age discrimination.

The Senate amendment retains the requirement that no civil action may be commenced by an individual until notice of intent to file suit has been given the Secretary not less than 60 days prior to commencement of such action.

House bill

The House bill contains no comparable provision.

Conference agreement

The House recedes with an amendment retaining the 180-day and 300-day time limitations in section 7(d), but requiring that a "charge" rather than a "notice of intent to sue" be filed with the Secretary of Labor within this period. The 300-day limitation and related State deferral yrocedures are described in more detail in Senate Report 95–493 at pages 5 to 7. The conferees adopt this discussion in the Senate report.

This change in language is not intended to alter the basic purpose of the notice requirement, which is to provide the Department with sufficient information so that it may notify prospective defendants and to provide the Secretary with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation. Therefore, the conferees intend that the "charge" requirement will be satisfied by the filing of a written statement which identifies the potential defendant and generally describes the action believed to be discriminatory.

The conferees agree that the "charge" requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and that therefore equitable modification for failing to file within

job-related benefits. Second, it includes liquidated damages (calculated as an amount equal to the pecuniary loss) which compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA.

The Supreme Court recently ruled that a plaintiff is entitled to a jury trial in ADEA actions for lost wages, but it did not decide whether there is a right to jury trial on a claim for liquidated damages *Lorillard* v. *Pons*, 98 S.Ct. 866 (1978). Because liquidated damages are in the nature of legal relief, it is manifest that a party is entitled to have the factual issues underlying such a claim decided by a jury. The ADEA as amended by this act does not provide remedies of a punitive nature. The conferees therefore agree to permit a jury trial on the factual issues underlying a claim for liquidated damages because the Supreme Court has made clear that an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages" *Overnight Transportation Company* v. *Missel*, 316 U.S. 572, 583–84, (1942).

AUTHORIZATION OF APPROPRIATIONS

House bill

The House bill eliminates the current authorization ceiling of $5,000,000 for any fiscal year for the purpose of administering the ADEA.

Senate amendment

The Senate amendment contains no comparable provision.

Conference agreement

The Senate recedes.

ADVISORY COMMITTEE ON SHELTERED WORKSHOPS

Senate amendment

The Senate amendment requires the Secretary of Labor to appoint a committee to advise the Secretary on the administration and enforcement of section 14 of the Fair Labor Standards Act.

House bill

The House bill contains no comparable provision.

the time period will be available to plaintiffs under this Act. See, *e.g.*, *Dartt* v. *Shell Oil Co.*, 539 F. 2d 1256 (10th Cir. 1976), affirmed by an evenly divided court, 98 S. Ct. 600 (1977); *Bonham* v. *Dresser Industries, Inc.*, 16 FEP Cases 510 (3d Cir. 1977); *Charlier* v. *S. C. Johnson & Son, Inc.*, 556 F. 2d 761 (5th Cir. 1977).

TOLLING OF THE STATUTE OF LIMITATIONS DURING CONCILIATION

Senate amendment

The Senate amendment amends section 7(e) of the act to provide that the statute of limitations as provided in section 6 of the Portal-to-Portal Act of 1947 shall be tolled (for a period not exceeding 2 years) during the period in which the Secretary of Labor is attempting to effect voluntary compliance pursuant to section 7(b). This amendment does not apply to conciliation required by section 7(d).

House bill

The House bill contains no comparable provision.

Conference agreement

The House recedes with an amendment which limits the period of tolling to 1 year rather than 2.

The conferees agree that it is appropriate for the tolling of the statute of limitations to begin when the Department of Labor states, in a letter to the prospective defendant(s), that it is prepared to commence conciliation pursuant to section 7(b) of the act.

The conferees wish to make clear that conciliation is not a jurisdictional prerequisite to maintaining a cause of action under the act. In *Brennan* v. *Ace Hardware Corp.*, 495 F. 2d 368 (8th Cir. 1974), the court reflected a proper understanding of the conciliation requirement in rejecting the employer's argument that the statutory directive is a "condition precedent to the court entertaining jurisdiction of the legal action." In that case the court correctly noted that section 7(b) grants to district courts the equitable discretion to stay lawsuits pending before them in order to permit conciliation to be completed before the lawsuit continues.

JURY TRIAL

Senate amendment

The Senate amendment provides that in any civil action brought by a person alleging discrimination on account of age there shall be a right to a jury trial if the action involves monetary damages, whether or not equitable relief is sought by any party in the same action.

House bill

The House bill contains no comparable provision.

Conference agreement

The House recedes with an amendment which provides for a jury trial on any issue of fact in an action for recovery of amounts owing as a result of a violation of the ADEA. Under section 7(b), which incorporates the remedial scheme of sections 11(b), 16 and 17 of the FLSA, "amounts owing" contemplates two elements: First, it includes items of pecuniary or economic loss such as wages, fringe, and other

Conference agreement

The Senate recedes.

CARL D. PERKINS,
AUGUSTUS F. HAWKINS,
JOHN H. DENT,
EDWARD P. BEARD,
MICHAEL O. MYERS,
JOSEPH A. LE FANTE,
TED WEISS,
W. L. CLAY,
BALTASAR CORRADA,
CLAUDE PEPPER,
ALBERT H. QUIE,
RONALD A. SARASIN,
JAMES M. JEFFORDS,
C. PURSELL,
PAUL FINDLEY,
GLADYS NOON SPELLMAN (only for consideration of sections 4(c) and 5, relating to Federal Government employment, of the House bill),
CEC HEFTEL (only for consideration of sections 4(c) and 5, relating to Federal Government employment, of the House bill),
ED DERWINSKI (only for consideration of sections 4(c) and 5, relating to Federal Government employment, of the House bill),

Managers on the Part of the House.

H. A. WILLIAMS,
JENNINGS RANDOLPH,
CLAIBORNE PELL,
GAYLORD NELSON,
DON RIEGLE,
EDWARD M. KENNEDY,
J. JAVITS,
DICK SCHWEIKER,
ROBERT STAFFORD,
JOHN H. CHAFEE,

Managers on the Part of the Senate.

Age Discrimination in Employment Act

Text of the Age Discrimination in Employment Act of 1967, P.L. 90-202, effective June 12, 1968. The Act reads as last amended by the 1978 Amendments.

STATEMENT OF FINDINGS AND PURPOSE

Sec. 2. (a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce of arbitrary discrimination in employment because of age burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

EDUCATION AND RESEARCH PROGRAM

Sec. 3. (a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this Act, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures:

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster, through the public employment service system and through cooperative effort, the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this Act, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 12.

PROHIBITION OF AGE DISCRIMINATION

Sec. 4. (a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for

employment any individual on the basis of such individual's age.

(c) It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be unlawful for any employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual member, or applicant for membership, has opposed any practice made unlawful by this section, or because such individual, member, or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

(e) It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual.

[**1978 Amendments:** Section 4(f)(2) was amended to include the following language: "and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual." This amendment is effective as of the date of enactment of the 1978 Amendments. However, there is an exception in the case of employees covered by a collective bargaining agreement in effect on September 1, 1977, which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938), and which otherwise would be prohibited by the 1978 amendments. This exception is effective only until the termination of such agreement or on January 1, 1980, whichever occurs first.]

(3) to discharge or otherwise discipline an individual for good cause.

STUDY BY SECRETARY OF LABOR

Sec. 5(a)(1). The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include—

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 12(a) of this Act to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 12(c), relating to certain executive employees, and the exemption contained in section 12(d), relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section, shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

[**1978 Amendments:** Subsections (A), (B), (C), and (D) were added to redesignated Section 5(a)(1), formerly Section 5 of the Act. Subsections (2) and (b) were also added to provide for a study of the effects of the 1978 Amendments.]

ADMINISTRATION

Sec. 6. The Secretary shall have the power—

(a) to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee-for-service basis, as he deems necessary to assist him in the performance of his functions under this Act;

(b) to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this Act.

RECORDKEEPING, INVESTIGATION, AND ENFORCEMENT

Sec. 7. (a) The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance with the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 209 and 211).

(b) The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217) and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to an individual as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): Provided, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c)(1) Any aggrieved individual may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: Provided, That the right of any individual to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such individual under this Act.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.

[**1978 Amendments:** Section 7(c) was redesignated Section 7(c)(1) and was amended to include subsection (2), entitling persons to a jury trial on issues of fact.]

(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 14(b) applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

[**1978 Amendments:** Section 7(d) was amended to substitute the filing of a charge, rather than notice of intent to sue, with the Secretary. Section 7(d)(1) takes effect with respect to civil actions brought after the date of enactment of the Amendments.]

(e)(1) Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act.

(2) For the period during which the Secretary is attempting to effect voluntary compliance with requirements of this Act through informal methods of conciliation, conference, and persuasion pursuant to subsection (b), the statute of limitations as provided in section 6 of the Portal-to-Portal Act of 1947 shall be tolled, but in no event for a period in excess of one year.

[**1978 Amendments:** Section 7(e) was redesignated Section 7(e)(1) and was amended to include subsection (2). Section 7(e)(2) applies to conciliations commenced by the Secretary of Labor after the date of enactment of the Amendments.]

NOTICES TO BE POSTED

Sec. 8. Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this Act.

RULES AND REGULATIONS

Sec. 9. In accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code, the Secretary of Labor may issue such rules and regulations as he may consider necessary or appropriate for carrying out this Act, and may establish such reasonable exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest.

CRIMINAL PENALTIES

Sec. 10. Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with a duly authorized representative of the Secretary while he is engaged in the performance of duties under this Act shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: Provided, however, That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

DEFINITIONS

Sec. 11. For the purposes of this Act—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employees having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency but such term does not include the United States, or a corporation wholly owned by the Government of the United States. (as amended effective May 1, 1974)

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States. (as amended effective May 1, 1974)

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for

the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relation Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy-making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. (as amended, effective May 1, 1974)

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States, or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States, or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf Lands defined in the Outer Continental Shelf Lands Act.

LIMITATION

Sec. 12. (a) The prohibitions in this Act shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

(b) In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 15 of this Act, the prohibitions established in section 15 of this Act shall be limited to individuals who are at least 40 years of age.

(c)(1) Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position,

if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profitsharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in aggregate, at least $27,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Secretary, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(d) Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1201(a) of the Higher Education Act of 1965).

[**1978 Amendments:** Section 12 was amended to raise the age of coverage of the Act from 65 to 70 and to provide for exemptions from coverage for certain executive employees and tenured teaching personnel. Sections 12(a), (c), and (d) take effect on January 1, 1979. Section 12(b) takes effect on September 30, 1978. Section 12(d) is repealed on July 1, 1982.]

ANNUAL REPORT

Sec. 13. The Secretary shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the effect of the minimum and maximum ages established by this Act, together with his recommendation to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the general age level of the population, the effect of the Act upon workers not covered by its provisions, and such other factors as he may deem pertinent.

FEDERAL-STATE RELATIONSHIP

Sec. 14. (a) Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of an action under this Act such action shall supersede any State action.

(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

NONDISCRIMINATION ON ACCOUNT OF AGE IN FEDERAL GOVERNMENT EMPLOYMENT

Sec. 15. (a) All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those

units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules and regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint or discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law. (as amended effective May 1, 1974)

(f) Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Act, other than the provisions of section 12(b) of this Act and the provisions of this section.

(g)(1) The Civil Service Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 12(b) of this Act, as added by the Age Discrimination in Employment Act Amendments of 1978.

(2) The Civil Service Commission shall transit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

[1978 **Amendments:** Section 15(a) was amended to add the phrase "who are at least 40 years of age" after "All personnel actions affecting employees or applicants for employment" and to add the phrase "personnel actions" after "(except". Subsections (f) and (g) were added to Section 15. Subsection (f) takes effect on September

30, 1978. Subsection (g) takes effect on the date of enactment of the Amendments.]

EFFECTIVE DATE

Sec. 16. This Act shall become effective one hundred and eighty days after enactment (except (a) that the Secretary of Labor may extend the delay in effective date of any provision of this Act up to an additional ninety days thereafter if he finds that such time is necessary in permitting adjustments to the provisions hereof, and (b) that on or after the date of enactment the Secretary of Labor is authorized to issue such rules and regulations as may be necessary to carry out its provisions).

APPROPRIATIONS

Sec. 17. There are hereby authorized to be appropriated such sums, not in excess of $5,000,000 for any fiscal year, as may be necessary to carry out this Act.

95TH CONGRESS } HOUSE OF REPRESENTATIVES { REPT. 95-
1st Session } { 527, Part 1

AGE DISCRIMINATION IN EMPLOYMENT ACT AMENDMENTS OF 1977

JULY 25, 1977.—Ordered to be printed

Mr. PERKINS, from the Committee on Education and Labor, submitted the following

REPORT

together with

ADDITIONAL AND INDIVIDUAL VIEWS

[To accompany H.R. 5383]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 5383), to amend the Age Discrimination in Employment Act of 1967 to provide that all Federal employees described in section 15 of such act shall be covered under the provisions of such act regardless of their age, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment strikes all after the enacting clause of the bill and inserts a new text which appears in italic type in the reported bill.

The title is amended to reflect the committee amendment.

PURPOSE

The primary purpose of H.R. 5383 is to reduce the incidence of mandatory retirement for workers in private and State and local employment and to eliminate mandatory retirement on account of age for most Federal workers. This would be done by raising the current upper age limit of 65 in the Age Discrimination in Employment Act to 70, removing the upper age limit of protection for Federal workers, and by clarifying the exemption for employee benefit plans to prohibit early mandatory retirement. Protections against all forms of age discrimination now prohibited by the Age Discrimination in Employment Act would also be extended to older workers in these expanded age groups.

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BACKGROUND

Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA) of 1967 was enacted to prohibit discrimination in employment because of age in such matters as hiring, job retention, compensation, and other terms, conditions, and privileges of employment. In 1974, the law was amended to include Federal, State, and local public employees who were not covered in the original act. The law generally limits its protection to persons aged 40 through 64.

The ADEA has had its current age limitations since it was enacted in 1967. The upper and lower age limits were controversial when the law was originally enacted, and more recently the upper age limit of 65 has been subject to additional question because it allows mandatory retirement based on age alone. The upper age cutoff of 65 was originally selected because it was a customary retirement age and the age at which many public and private pension benefits became payable—not for any scientific reason.

Section 5 of the ADEA, as enacted in 1967, directs the Secretary of Labor to undertake a study of institutional and other arrangements giving rise to involuntary retirement and to report his findings and any legislative recommendations to the President and Congress. No such report has ever been completed, even though it should be most useful in the current reevaluation of the upper age limit in the ADEA.

Reason for legislation

Increasingly, it is being recognized that mandatory retirement based solely upon age is arbitrary and that chronological age alone is a poor indicator of ability to perform a job. Mandatory retirement does not take into consideration actual differing abilities and capacities. Such forced retirement can cause hardships for older persons through loss of roles and loss of income. Those older persons who wish to be reemployed have a much more difficult time finding a new job than younger persons.

Society, as a whole, suffers from mandatory retirement as well. As a result of mandatory retirement, skills and experience are lost from the work force resulting in reduced GNP. Such practices also add a burden to Government income maintenance programs such as social security.

In testimony before the Select Committee on Aging on March 16, 1977, Suzanne G. Haynes, Ph. D., of the National Heart, Lung, and Blood Institute, reported her research findings that the expected death rates in the third and fourth years after mandatory retirement were about 30 percent higher than expected. While more study of this issue is needed, Dr. Haynes agreed with Dr. Robert Butler, Director of the National Institute on Aging, who observes that the right to work is basic to the right to survive.

The committee has studied the arguments against reducing or eliminating mandatory retirement and while some have merit, the committee feels that they are far outweighed by the arguments against discrimination on account of age.

One concern expressed has been that reducing mandatory retirement would worsen the unemployment problem. This committee is very

concerned about unemployment. However, as Congressman Paul Findley stated in testimony before this committee on June 2, 1977:

> Our present system * * * of forcing retirees to give their jobs to younger people simply trades one form of unemployment for another. Nor does depriving older and still capable Americans of jobs make any more sense than discriminating in employment against blacks, women, or religious or ethnic minorities.

It should also be noted that only a relatively small percentage of older workers in the public or private sector actually retire because of mandatory retirement. Alan Campbell, Chairman of the U.S. Civil Service Commission, stated in testimony before the House Committee on Post Office and Civil Service on June 23, 1977, that:

> Insofar as the general Federal work force is concerned, the removal of the mandatory age 70 provision should have little effect on recruiting younger people. Our experience in recent years has been one of high turnover at the senior levels due to early retirement.

A related argument has been that mandatory retirement is necessary to provide job opportunities for minorities and women. This argument overlooks the fact that women and minorities also grow old. Faced with what some have termed "double [or triple] jeopardy"—i.e., being old, a minority, and perhaps female—these persons need even more this protection against a possible added form of discrimination—on account of age.

There has also been the argument that pension and other employee benefit plan costs would increase if the work force were older. Unfortunately, there is little information on this issue. However, it is possible that pension plan costs would decrease if mandatory retirement were eliminated because fewer retirees would draw on pension funds and/or would draw for a shorter period of time. In addition, the bill retains for non-Federal workers the current provision in the Age Discrimination in Employment Act which allows older workers to be excluded from an employee benefit plan if necessary to the economic stability of the plan. Extending the protections of the Age Discrimination in Employment Act to all Federal workers age 40 and over, thereby eliminating mandatory retirement, would not cause any additional costs to the civil service retirement and disability trust fund under current law governing that program.

Some have expressed a concern over how management would terminate incompetent or unproductive employees without mandatory retirement. The committee believes that any successful employer must have methods of releasing employees incapable or unwilling to perform satisfactorily during the first 45 years of their work lives. If not, an additional few years shouldn't be a significant burden. The Chairman of the Civil Service Commission, which is the employer subject to perhaps the strongest employee protection policies, has stated:

> Repeal [of the mandatory retirement age of 70] would have no serious adverse effects on the management of the Govern-

ment. In those instances where it could, we believe effective management could prevent or alleviate these effects.

The argument has also been made that older workers perform their jobs less well. Testimony to the committee cited the results of various research findings which indicate that older workers were as good or better than their younger coworkers with regard to dependability, judgment, work quality, work volume, human relations, and absenteeism; and older workers were shown to have fewer accidents on the job.[1] As Congressman Pepper stated before our committee:

> The Labor Department's finding that there is more variation in work ability within the same age group than between age groups justifies judging workers on competency, not age.

Obviously, many of those responsible for hiring and firing in the Federal Government do not believe age disqualifies one for employment, because as of March 1976, there were 11,428 Federal civilian employees age 70 and over. (This is currently possible because of special exemptions to the mandatory retirement requirement, the hiring of temporary employees, and the fact that 70 is the mandatory retirement age only after 15 years of service.)

It should be noted that under present law, 60 percent of workers covered by a private pension plan in 1974 had no mandatory retirement age on their job, according to a Department of Labor study.

Support for this legislation

Support for ending and reducing mandatory retirement is widespread. Members of Congress from both ends of the political spectrum have introduced bills in the last two Congresses to end mandatory retirement. A total of 167 different members have sponsored legislation in the 95th Congress which would eliminate or restrict mandatory retirement on the basis of age. Organizations such as the American Medical Association, as well as individuals such as Willard Wirtz, Secretary of Labor under President Johnson, have made public statements in opposition to mandatory retirement. In testimony before the Select Committee on Aging, the United Steelworkers of America also opposed mandatory retirement at a specific age.

Specific support for eliminating mandatory retirement generally, or eliminating it from the Federal service, has also been given by the National Association of Retired Federal Employees, the American Federation of Government Employees which is affiliated with the AFL–CIO, the American Association of Retired Persons/National Retired Teachers Association, the National Council of Senior Citizens, the National Council on the Aging, the Gray Panthers, the American Civil Liberties Union, and the American Personnel & Guidance Association among others.

The Chairman of the Civil Service Commission has testified in favor of eliminating the mandatory retirement age of 70 for those in the civil service. The Chairman of the Civil Rights Commission has also spoken out several times in favor of eliminating mandatory retirement.

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[1] Citations for much of this research is given in Meier, Elizabeth L., and Elizabeth A. Kerr, "Capabilities of Middle-Aged and Older Workers: A Survey of the Literature," Industrial Gerontology, v. 3, summer 1976: pp. 147–156.

A public opinion poll conducted by Louis Harris & Associates, Inc., in 1974 found that 86 percent of the American public age 18 and over agreed with the following statement: "Nobody should be forced to retire because of age, if he wants to continue working and is still able to do a good job." Seventy-nine percent of the public aged 18–64 with responsibility for hiring and firing also agreed with this statement. Four out of five readers of Nation's Business responding to the question "Should retirement be mandatory at a certain age?" said no.

U.S. court decisions

There have been several conflicting court decisions recently regarding the constitutionality of Federal laws requiring mandatory retirement, the effect of the Age Discrimination in Employment Act on Federal mandatory retirement requirements, and the interpretation of the exception in the Age Discrimination in Employment Act relating to employee benefit plans. The differing opinions relating to the laws and Congress' intent with regard to these laws makes it even more important for Congress to act on this issue.

Four recent cases relate to mandatory retirement laws for Federal employees.[2] Basically, these decisions have held that statutes requiring mandatory retirement themselves are not unconstitutional, but that it is unconstitutional to treat employees in similar positions differently with respect to mandatory retirement. It has been held that the current Age Discrimination in Employment Act does not supersede existing Federal mandatory retirement statutes. A district court held that mandatory retirement before age 65 is legal for Federal employees if such a policy is part of the pension plan in accordance with section 4(f) (2) of the act. However, more recently an appellate court in its opinion noted that section 15 of the act, covering Federal workers, is complete in itself and not subject to other provisions and limitations of the act.

A number of decisions have also been made recently on the issue of whether mandatory retirement under private plans before age 65 is lawful under section 4(f) (2) of the Age Discrimination in Employment Act.[3] Three courts have reached substantially different decisions on this question. One has held that mandatory retirement before age 65 in accordance with employee benefit plan provisions is legal based on the clear language in the act. Another court determined that mandatory retirement before age 65 is not generally allowable even when included in pension plan provisions because the legislative history indictates that Congress intended that there must be some economic or business purpose other than arbitrary age discrimination for the 4(f) (2) exception to be invoked. In a third decision related to this issue, a court made a distinction between discharge and mandatory retirement on a pension, and said that the latter is not prohibited by the Age Discrimination in Employment Act. The question on section 4(f) (2) is pending before the Supreme Court in *McMann* v. *United Airlines*.

It should be emphasized that the current Age Discrimination in Employment Act and these amendments apply to State and local govern-

[2] *Weisbrod* v. *Lynn*, 420 U.S. 940 (1975), aff'g 383 F. Supp. 933 (D.C. 1974); *Bradley* v. *Kissinger*, Civil Action No. 76–0085 (June 30, 1976); *Christie* v. *Marston* (No. 76–1780 decided Mar. 4, 1977); *Bradley* v. *Vance* (No. 76–0085 filed June 28, 1977).

[3] *Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d 212 (1974); *McMann* v. *United Airlines, Inc.* (542 F. 2d 217); *Zinger* v. *Blanchette et al.*, No. 76–1249.

ment employees. Although in *National League of Cities, et al* v. *Usery* (426 U.S. 833 (1076)), the U.S. Supreme Court determined that Federal statutory minimum wage and overtime requirements cannot be applied to State and local governments because it would infringe on the rights of States and localities to regulate the terms and conditions of employment of their own employees, in several lower court cases decided since that time, the courts have all held that the ruling in the *League of Cities* case does not apply to Federal laws prohibiting employment discrimination. (See, for example: *Usery* v. *Charleston County School District*, U.S. District Court, District of South Carolina (CA 76-248); *Usery* v. *Board of Education of Salt Lake City*, U.S. District Court, District of Utah (CA 75-510); *Usery* v. *Bettendorf Community School District*, U.S. District Court, Southern District of Iowa (CA 76-6-D); *Usery* v. *Fort Madison Community School District*, U.S. District Court, Southern District of Iowa (CA 75-62-1); *Usery* v. *Sioux City Community School District*, U.S. District Court, Northern District of Iowa (CA 76-4024); *Riley* v. *University of Lowell*, U.S. District Court, District of Massachusetts (CA 76-1118-M); *Christensen* v. *State of Iowa*, U.S. District Court, Northern District of Iowa (CA 74-2030); *Usery* v. *Allegheny County Institution District*, 45 U.S. L. W. 2251, November 23, 1976.)

Committee Action

In the 94th and 95th Congresses, several types of bills were introduced with the intent of eliminating or reducing mandatory retirement on account of age. This committee held hearings on three types of bills in the 94th and 95th Congresses. The Committee on Post Office and Civil Service has also held hearings in the 95th Congress on mandatory retirement for Federal employees. In addition, the Select Committee on Aging has had a continuing interest in this issue; in the 94th and 95th Congresses 8 days of hearings relating to this issue were held, and a staff study on age discrimination was issued in September 1976.

This Committee first held hearings on H.R. 2588, a bill to eliminate mandatory retirement on February 9, 1976. Hearings were held on H.R. 14879 and H.R. 15342, bills to eliminate mandatory retirement for Federal employees on September 14, 1976. Hearings were again held on June 2, 1977, on three bills: H.R. 65, introduced by Mr. Findley and cosponsors, to eliminate the upper age of 65 in the Age Discrimination in Employment Act; H.R. 1115, introduced by Mr. Pepper, to remove the age limits in the Age Discrimination in Employment Act for Federal employees; and H.R. 6798 introduced by Mr. Weiss and cosponsors, to eliminate the upper age of 65 in the Age Discrimination in Employment Act and to clarify the exception in 4(f)(2) of the act.

The committee also has had the benefit of testimony presented to the Select Committee on Aging and the House Committee on Post Office and Civil Service on this subject.

H.R. 5383, a bill identical to H.R. 1115 was introduced by Mr. Pepper and Mr. Findley on March 22, 1977.

On June 29, 1977, the Subcommittee on Employment Opportunities met and ordered reported H.R. 5383 with amendments to the Committee on Education and Labor by a unanimous vote.

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On July 14, 1977, H.R. 5383 as amended by the committee was ordered reported by the Committee on Education and Labor by a vote of 33 to 0 with 1 member voting present.

SUMMARY AND DISCUSSION OF PRINCIPAL PROVISIONS

Increasing the upper age limit to 70

This bill would amend section 12 of the Age Discrimination in Employment Act to raise the upper limit from 65 to 70 for all non-Federal employees covered by the act.

The age 70 limit would become effective at the end of 180 days after enactment. From the date of enactment through the 180-day period, the upper age limit would continue to be 65. This will give employers and labor organizations an opportunity, where necessary, to bring their policies and employee benefit plans into conformance with the law.

The provision raising the upper age limit is in no sense retroactive. No new rights accrue before or during the 180-day period. Workers aged 65 through 69 who have been mandatorily retired before or during the 180-day period after enactment could not claim discrimination under these amendments. Such workers, if under age 70, would of course, be protected by the provisions of the Age Discrimination in Employment Act in applying for new employment after the 180-day period.

The committee has considered removing the upper age limit entirely, but has decided that an increase to age 70 at this time is the best course of action. The age 70 limit is a compromise between some who favor removing the age limit entirely, and others who are uncertain of the consequences of changing the present age 65 limit. Experience with the age 70 limit would give us more data and other facts to better evaluate the pro and con arguments on eliminating mandatory retirement completely. There is also a precedent for the age 70 limit. This has been the age of mandatory retirement for most civil service employees for many years, and the committee knows of no managerial or labor problems as a result of the Federal mandatory retirement age of 70.

The committee expects continuing public and congressional interest in eliminating mandatory retirement. The committee expects to reassess, in due course, this newly established upper age limit, evaluating experience in the private and public sectors with an eye toward possibly eliminating the upper age limit altogether. To help with this evaluation, the bill would also require a report from the Secretary of Labor on mandatory retirement and the feasibility of eliminating the upper age limit in the act. The 1967 act included a requirement for the Secretary of Labor to submit a report on involuntary retirement but this report has not yet been completed. Therefore, this bill would establish deadlines in law for this report. An interim report would be due 1 year after the effective date, and a final report would be required no later than 2 years after the effective date.

In raising the age limit to 70, the committee would also make sure that employee rights could not be negotiated away through employee benefit plans. These amendments would also, therefore, clarify section 4(f)(2) of the Age Discrimination in Employment Act so that employee benefit plans such as pension plans or seniority systems cannot be an excuse for the involuntary retirement on account of age for any

worker within the protected age group of the act. These amendments prohibit such mandatory retirement in negotiated plans as well as in nonnegotiated plans and systems.

There has been some dispute over the interpretation of 4(f)(2) in current law which provides:

> (f) it shall not be unlawful for an employer, employment agency, or labor organization—
>
> * * * * * * *
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purpose of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual;

Studies indicate that over half of the workers under pension plans in this country have mandatory retirement policies on their job, and the most common age of such mandatory retirement is 65. Some courts have interpreted section 4(f)(2) to allow mandatory retirement under current law when pension plans require such retirement before age 65. The committee believes that if such interpretation were to prevail, raising the upper age limit in the act to 70 would have little meaning for many workers. Both the reports of the Committee on Education and Labor and the Senate Committee on Labor and Public Welfare reporting the legislation which led to the Age Discrimination in Employment Act of 1967 contain identical language explaining the exception in section 4(f)(2):

> This exception serves to emphasize the primary purpose of the bill—the hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans.

During the Senate debate, Senator Yarborough, the manager of the bill, stated about this section, "this will not deny any individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement or insurance plan." Mr. Javits at the time stated:

> "An employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers. If the older worker chooses to waive all of those provisions, then the older worker can obtain the benefits of this act, * * *."

The committee views this amendment as a clarification, and as such it becomes effective immediately upon enactment for plans with a mandatory retirement age under 65.

During the full committee's consideration of this bill, Mr. Weiss offered, and the committee accepted, an amendment to defer the effective date of prohibition of mandatory retirement policies at ages 65 through 69 in employee benefit plans and seniority systems contained in collectively bargained agreements in effect 30 days prior to enactment. The reason for the extended effective date for collectively bargained employee benefit plans is to recognize, and provide the maximum deference to, contracts negotiated between management and labor, consistent with the committee's desire to end mandatory re-

tirement of those workers under age 70. The committee recognizes that these contracts were negotiated in good faith with reciprocal agreements and concessions made. This delay will give management and labor an opportunity to make clarifications as required by the change in pension plan agreements. This postponed effective date would not, however, apply to pension plans not the result of collectively bargained agreements. The table below sets forth the dates when the bill would prohibit mandatory retirement on account of a seniority system or employee benefit plan:

Plans requiring mandatory retirement before age 65.	Upon enactment (unless already prohibited by U.S. Court decisions).
Plans requiring mandatory retirement at ages 65 through 69:	
Collectively bargained plans in effect 30 days prior to enactment	2 years after enactment, or at the expiration of negotiated agreements, whichever comes first.
All other plans	181st day after enactment.

Nothing in these amendments would change the provisions of the Employee Retirement Income Security Act of 1974, and no additional requirements would be made of pension plan programs under these amendments.

The Employee Retirement Income Security Act of 1974 (ERISA) now defines normal retirement age; this is usually age 65 or before, but may be later for persons beginning participation in the plan after age 55. Normal retirement is the age at which a worker receives full benefits, that is, benefits that are not actuarially reduced on account of early retirement. This bill would not change the definition of normal retirement age. These amendments do not require that any additional benefits, benefit accruals or actuarial adjustments be provided other than those required under ERISA.

Number of workers and employee benefit plans potentially effected

Mandatory retirement is often associated with pension plans.

A Bureau of Labor Statistics study of private pension plan provisions as they were in 1974 showed that of the almost 21 million workers covered by these plans, 41 percent had mandatory retirement policies on their jobs. (In 1971, 58 percent of the workers covered by pension plans had mandatory retirement policies on their jobs.) Thirty-seven percent of the workers under negotiated plans had mandatory retirement policies on their jobs, while 54 percent of the workers under nonnegotiated plans (unilaterally controlled by a company or union) were subject to such policies. Mandatory retirement provisions in private pensions are classified as compulsory (which permit employers to retire workers reaching a specified age) and automatic (which require workers to retire when they reach a specified age). Plans may have either and a few have both mandatory retirement provisions; 30 percent of the workers were under plans which had a compulsory retirement age of 65; and 2 percent had a compulsory retirement age of 68; 4 percent of the workers had plan provisions requiring automatic retirement at 65, 6 percent at age 68, and 3 percent at age 70. In addition, separate from these mandatory retirement provisions, 10 percent of the workers had forced retirement provisions in their plans which permit employers to retire workers before normal retirement provided certain minimum age and service requirement are met.

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TABLE 1.—FORCED RETIREMENT PROVISIONS IN BASIC DEFINED BENEFIT PENSION PLANS, BY TYPE OF PROVISION AND BARGAINING STATUS OF PLANS, SEPT. 1, 1974 [1]

Type of provision	Total			Bargaining status (workers in millions)								
				Negotiated [2]			Nonnegotiated [3]			Not determinable		
	Number of workers	Percent	Percent	Number of workers	Percent	Percent	Number of workers	Percent	Percent	Number of workers	Percent	Percent
All plans studied	20.6	100	.....	15.1	100	.....	5.2	100	.....	0.3	100	.....
Mandatory retirement [4]	8.5	41	100	5.6	37	100	2.8	54	100	.1	35	100
Compulsory retirement only	5.8	28	67	3.7	24	66	2.0	38	71	.1	28	79
Automatic retirement only	1.7	8	20	1.3	8	23	.4	8	16	(5)	6	16
Compulsory and automatic retirement	1.0	5	12	.7	4	12	.4	7	14	(5)	2	5
Forced early retirement [6]	2.0	10	100	1.9	10	100	.2	4	100	.....	.....	.....

[1] Preliminary data based on an analysis of a probability sample of private defined benefit pension plans representing the universe of private plans that reported to the Department of Labor under the Welfare and Pension Plan Disclosure Act of 1959, as amended, each with at least 26 active participants during the plan year ending in 1974. Excluded from this study are plans covering about 2,300,000 workers, that could not be analyzed because plan documents were not available in the Department's files. Number of workers is the estimated number of active worker participants (excludes retirees) in 1974.

[2] For this study, negotiated plans include (1) those established for the 1st time through collective bargaining and (2) those originally established by either employer or union but later brought within the scope of collective bargaining for some but not necessarily all plan participants. Nonnegotiated plans are plans unilaterally established, controlled and administered by a company or union.

[3] Compulsory retirement provisions permit employers to retire workers reaching a specified age. Automatic retirement provisions require workers to retire when they reach a specified age.

[4] Less than 100,000 workers.

[5] Forced early retirement provisions permit employers to retire workers before normal retirement age.

Note: Because of rounding, sums of individual items may not equal totals.

A 1972 survey by Robert Tiloye of the largest State and local retirement systems covering about 70 percent of all employees enrolled in such systems showed that most had a mandatory retirement age; one-third of the plans set this age at from 65 through 69, the other two-thirds were at age 70 or later.

In addition to restricting mandatory retirement, this bill would also extend the other protections of the Age Discrimination in Employment Act to workers aged 65 through 69. In May of 1977, 1,672,000 persons aged 65 through 69 were employed, and an additional number were in the work force looking for jobs.

Of course, even among those potentially subject to mandatory retirement policies, there are various other reasons for retirement such as health, family reasons, and desire to retire. From a Social Security Administration survey,[1] we know that only a small proportion of workers must stop working because of mandatory retirement. And only about one-half of these wanted to continue working.

Federal Employees

These amendments, not withstanding any other provision of law, would eliminate mandatory retirement and other age discrimination in Federal employment including job advancement and hiring. Mandatory retirement would be eliminated for the great majority of jobs in the civil service, for positions in the foreign service, for tax court judges, District of Columbia public school teachers, District of Columbia judges, the United States Comptroller General, and the Director of the Federal Judicial Center among others. However, the current provision in section 15(b) which allows the Civil Service Commission to establish maximum age requirements when such age is a bona fide occupational qualification necessary to the performance of job, would remain. These amendments would also specifically make unlawful the current Federal civil service policy of not allowing workers age 70 and over to be hired on a permanent basis. These amendments would not effect current provisions allowing early or voluntary retirement for Federal civilian employees.

This bill would continue the current interpretation of general applicability of the act to various groups of Federal employees. Under the current interpretation of the Civil Service Commission, which is the enforcement authority for Federal employees, this act covers civil employees but not members of the armed forces. Nothing in these amendments would change this interpretation.

Section 15 of the act which prohibits employment discrimination on account of age in Federal Government employment is complete in itself. Restrictions and limitations in other parts of the act, such as paragraph (a) of section 12 and paragraph (f) of section 4 do not apply to section 15. However, these amendments do not in any way disallow Federal employees from being discharged or terminated for cause or from being hired, retired or terminated based on a bona fide occupational qualification. Section 12(b) would be added by this bill to clarify that the age limits applicable to other parts of the act do not apply to Federal employees.

[1] Based on a survey of workers aged 62 through 65 who were awarded social security retirement benefits in July–December 1968 and 1969. Reported in "Compulsory Retirement Among Newly Entitled Workers: Survey of New Beneficiaries," by Virginia Reno, in Social Security Bulletin, March 1972.

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The Civil Service Commission would be required to study the effects of the amendments relating to Federal employees and transmit a report of its findings no later than January 1, 1979.

Number of Federal workers potentially affected

Many Federal laws specify a mandatory retirement age for Federal employees. Under the Federal Civil Service Retirement System, employees must generally retire no later than at age 70 with 15 years of service or as soon thereafter as the employee has completed 15 years of service; there are, however, provisions for granting individual exemptions. There are earlier mandatory retirement requirements for some special groups of employees such as law enforcement employees; and no mandatory retirement requirements apply to others such as congressional employees.

Only a few Federal employees choose to work up to or beyond mandatory retirement age. The latest available data, for fiscal year 1976, indicate that during that year, only 1,509 workers under civil service retirement were mandatorily retired.

General statement with regard to increased protection for Federal and non-Federal employees

While it is the primary purpose of this legislation to limit mandatory retirement and other employment discrimination for non-Federal employees aged 40–69, and to prohibit unreasonable mandatory retirement with respect to Federal employment, it is not intended that the bill prohibit mandatory retirement or other employment practices where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular activity such as provided for in the current law in section 15(b) and 4(f)(1). It is recognized that certain mental and physical capacities may decline with age, and in some jobs with unusually high demands, age may be considered a factor in hiring and retaining workers. For example, jobs such as some of those in air traffic control and in law enforcement and firefighting have very strict physical requirements on which the public safety depends. The committee, however, expects that age will be a relevant criteria for only a limited number of jobs. In addition, this legislation is not intended to prohibit the discharge of or other disciplinary measures against an employee for good cause.

In most cases, more important than the possible decline of capabilities experienced with age is the fact that this decline varies with individuals as to age and intensity, varies in importance to particular jobs, and may be compensated for by other attributes which often increase with age, for example, experience and judgment.

This legislation would not forbid or restrict reasonable attempts to maintain high mental and physical standards through practices such as more frequent physical examinations for older employees.

This legislation does not require employers to provide special working conditions for older workers to allow them to remain or become employed. While special jobs, part-time employment, retraining and transfers to less physically demanding jobs may be of great benefit to the older employees and the employer alike, these activities are not required by this legislation.

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OVERSIGHT

No oversight findings or recommendations have been presented to the committee by the Committee on Government Operations. The committee has made no oversight findings with respect to age discrimination during this session of Congress.

CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., July 18, 1977.

Hon. CARL D. PERKINS,
Chairman, Committee on Education and Labor, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for H.R. 5383, the Age Discrimination in Employment Act Amendments of 1977.

Should the Committee so desire, we would be pleased to provide further details on the attached cost estimate.

Sincerely,

JAMES BLUM,
(For Alice M. Rivlin, Director).

Attachment.

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number: H.R. 5383.

2. Bill title: A bill to amend the Age Discrimination in Employment Act of 1967 to provide that Federal employees who are 40 years of age or older shall be protected by the provisions of section 15 of such act, and for other purposes.

3. Purpose of bill: The primary purposes of this bill are (1) to change the age limits of the class of individuals to whom the provisions of the 1967 act, as subsequently amended, apply, to individuals at least 40 years of age (in the case of Federal employees) and to those at least 40 years of age but less than 70 years of age (in the case of all other employees); (2) to prohibit (non-Federal) employers, labor organizations, et cetera, from observing the terms of seniority systems or employee benefit plans which require or permit the involuntary retirement on the basis of age; (3) to restrict the Civil Service Commission's freedom to grant exemptions from compliance with the act to Federal agencies, departments, et cetera.

4. Cost estimate:

[In millions of dollars: fiscal years]

	1978	1979	1980	1981	1982
Authorization levels: Enforcement costs, Department of Labor	0.4	0.4	0.5	0.5	0.5
Projected total outlays:					
Enforcement costs, Department of Labor	.4	.4	.5	.5	.5
Savings to civil service	−4.4	−7.9	−10.3	−11.6	−11.6
Total	−4.0	−7.5	−9.8	−11.1	−11.1

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5. Basis for estimate:

Enforcement costs.—These figures represent additional enforcement costs which will result from the expanded applicability of the protection of the act. In fiscal year 1977, $2.5 million was authorized to the Department of Labor for enforcement. In view of the relative sizes of the population aged 40–64 and 40–69, we estimate that enforcement costs would increase by 15 percent as a consequence of the amendment. Because all enforcement costs are for salaries and expenses, future costs are projected on the basis of CBO forecasts of the General Federal Pay Schedule, and a spend-out rate of .96 is assumed.

Study costs.—The bill extends the scope of the study to be undertaken by the Secretary of Labor and calls for a new study by the Civil Service Commission, but it is anticipated that these studies will be performed by existing staff; hence no cost is attributed to these provisions.

Savings to Civil Service and social security.—The figures representing savings to Civil Service are based on the assumption that of the approximately 1500 persons per year who retire at age 70, 600 would continue to work in the absence of mandatory retirement and one-fourth of these would cease to work in each subsequent year. Benefits and life expectancy were estimated from civil service data.

No estimate has been made of the possible effects of the legislation on social security outlays or receipts, because of the lack of recent and reliable information to make such an estimate. Social security cost impacts would depend on the behavior of both employers and employees in a complicated way. The change in age limits will have the effect of allowing a particular subgroup of the working population to retire later than they are currently permitted under existing mandatory retirement policies. The size of this subgroup, let alone the fraction thereof which would take advantage of the opportunity to work longer, cannot be determined from available data. Moreover, even if these variables could be predicted, there is no presumption as to how the labor market would respond. For example, would employers substitute older for younger workers or would wages be depressed as a result of an expanded workforce? Both receipts and payments of the social security system depend upon the precise configuration of the covered workforce—its size, composition and earnings structure—as well as the timing of retirement, and the benefit entitlements of retirees. Given our current knowledge, any estimate would be subject to a very wide margin of error. Some social security savings are likely to result as a consequence of the legislation because some workers will forego private pensions and part or all of their social security benefits in order to continue working. But it is impossible to specify what the savings would be at this stage.

6. Estimate comparison: Not applicable.

7. Previous CBO estimate: None.

8. Estimate prepared by: Frank Lichtenberg (Civil Service estimates provided by Earl Armbrust).

9. Estimate approved by:

JAMES L. BLUM,
Assistant Director for Budget Analysis.

The Committee concurs with the cost estimate of the Congressional Budget Office.

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Inflation Impact

Because of the possibility of reduced expenditures under private pension plans and the net savings in Federal expenditures the Committee anticipates no inflationary impact because of this legislation. The effect of the bill will be to increase the labor supply of older workers and thus to further reduce inflationary pressures.

H.R. 5383

Section-by-Section Analysis

SECTION 1—SHORT TITLE OF THE ACT

This section provides that the act may be cited by the short title: "Age Discrimination in Employment Act Amendments of 1977".

SECTION 2

Subsection (a) would amend paragraph 2 of section 4(f) of the Act which contains the exemption from the provisions of the Act for a bona fide seniority system or any bona fide employee benefit plan by excluding from the exemption any provision in such seniority system or employee benefit plan which would require or permit the involuntary retirement of any employee because of the age of such employee.

Subsection (b) would delay the effective date of prohibition of mandatory retirement policies at ages 65 through 69 in pension plans or seniority systems contained in bona fide collectively bargained agreements in effect 30 days prior to the date of enactment. The effective date would be upon the termination of the agreement or two years after the date of enactment, whichever comes first.

SECTION 3

Subsection (a) of this section would amend section 5 of the Act which directs the Secretary of Labor to study institutional and other arrangements causing involuntary retirement and to report his findings to the President and the Congress by adding additional elements to be included in the study including the feasibility of eliminating the upper age limit in section 12(a) of the Act, and the potential effect of any such elimination on employees and employers. Subsection (b) would add a subsection (b) to section 5 which would require the Secretary of Labor to provide an interim report on the study required by this section within one year of this Act's effective date and a completed report within two years of its effective date.

SECTION 4

This section would amend section 12 of the Act which contains the upper and lower age limitations applicable to the provisions of the Act in three ways: (1) Subsection (a) would redesignate the provisions of section 12 as section 12(a) and limits this subsection as provided for in subsection (b) which is being added to section 12 of the Act; (2) Subsection (b) would amend the upper age limit in the newly designated section 12(a) to provide that 180 days after the date of enact-

ment, the upper age limit will be 70 instead of the present 65; and (3) Subsection (c) adds a subsection (b) to section 12 to limit the provisions of section 15 which involves Federal personnel actions to persons who are at least 40 years of age.

SECTION 5

Subsection (a) of this section would amend section 15(a) of the Act which pertains to Federal employment to provide that all personnel activities in the Federal sector involving persons who are at least 40 years of age shall be made free of any discrimination based on age, notwithstanding any existing provision of Federal law concerning an established age for mandatory retirement or relating to other terms and conditions of employment. Subsection (b) would amend section 15(b) which empowers the Civil Service Commission to establish reasonable exemptions to the provisions of section 15 to provide that such exemptions shall not allow the observance of the terms of a seniority system or employee benefit plan if such system or plan requires the involuntary retirement of any employee because of the age of the employee. Subsection (c) would add two new subsections to section 15: (1) a new subsection (f) which would clarify that no provisions in the Age Discrimination in Employment Act of 1967 shall apply to any personnel action described in section 15(a) of such Act except the provisions of sections 12(b) and 15; and (2) a new subsection (g) which requires the Civil Service Commission to study the effects of the amendments to section 12 and 15 of the Age Discrimination in Employment Act made by these 1977 amendments and report its findings to the President and Congress by January 1, 1979.

SECTION 6

This section would amend section 17 of the Act which limits the authorization of appropriations necessary to carry out the Act to $5 million by striking out the $5 million limit and thereby authorizing to be appropriated such sums as necessary.

H.R. 5383

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Age Discrimination in Employment Act of 1967".

STATEMENT OF FINDINGS AND PURPOSE

SEC. 2. (a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain

employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

EDUCATION AND RESEARCH PROGRAM

SEC. 3. (a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this Act, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures—

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this Act, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 12.

PROHIBITION OF AGE DISCRIMINATION

SEC. 4. (a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawfully by this section, or because such individual, membership or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

(e) It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual *and except that the involuntary*

retirement of any employee shall not be required or permitted by any such seniority system or any such employee benefit plan because of the age of such employee; or

(3) to discharge or otherwise discipline an individual for good cause.

STUDY BY SECRETARY OF LABOR

SEC. 5. *(a)* The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. *Such study shall include a determination of the feasibility of eliminating the upper age limitation established in section 12(a) of this Act, and an examination of the effect of any such elimination upon employees and an investigation of actions which employers would be required to undertake in order to comply with the provisions of this Act as a result of any such elimination.*

(b) The report required in subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report no later than one year after the effective date of the Age Discrimination in Employment Act Amendments of 1977 and in final form no later than two years after such effective date.

ADMINISTRATION

SEC. 6. The Secretary shall have the power—

(a) to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this Act;

(b) to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this Act.

RECORDKEEPING, INVESTIGATION, AND ENFORCEMENT

SEC. 7. (a) The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance with the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 209 and 211).

(b) The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor

Standards Act of 1938, as amended (29 U.S.C. 216, 217): *Provided*, That liquidation damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—

(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

(2) in a case to which section 14(b) applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceeding under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act.

NOTICES TO BE POSTED

SEC. 8. Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this Act.

RULES AND REGULATIONS

SEC. 9. In accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code, the Secretary of Labor may issue such rules and regulations as he may consider necessary or appropriate for carrying out this Act, and may establish such reasonable exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest.

CRIMINAL PENALTIES

SEC. 10. Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Secretary while he is engaged in the performance of duties under this Act shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: *Provided, however*, That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

DEFINITIONS

SEC. 11. For the purposes of this Act—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized group of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunity to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

LIMITATION

SEC. 12. [The] *(a) Except as provided in subsection (b) of this section, the* prohibitions in this Act shall be limited to individuals who are at least forty years of age [but less than sixty-five years of age.] *but less than—*

(1) sixty-five years of age, for the 180-day period following the date of the enactment of the Age Discrimination in Employment Act Amendments of 1977; and

(2) seventy years of age, after the close of period specified in paragraph (1) of this subsection.

(b) In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 15 of this Act, the prohibitions established in section 15 of this Act shall be limited to individuals who are are least forty years of age.

ANNUAL REPORT

SEC. 13. The Secretary shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the effect of the minimum and maximum ages established by this Act, together with his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the general age level of the population, the effect of the Act upon workers not covered by its provisions, and such other factors as he may deem pertinent.

FEDERAL-STATE RELATIONSHIP

SEC. 14. (a) Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action.

(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

NONDISCRIMINATION ON ACCOUNT OF AGE IN FEDERAL GOVERNMENT EMPLOYMENT

SEC. 15. (a) [All]

Notwithstanding any other provision of Federal law relating to mandatory retirement requirements or relating to the hiring, discharging, or promoting of employees or applicants for employment, and notwithstanding any other provision of law, all personnel actions affecting employees or applicants for employment *who are at least forty years*

of age (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position, *except that the Commission may not establish any exemption which permits any department, agency, or other entity referred to in subsection (a) of this section to observe the terms of any seniority system or any employee benefit plan such as a retirement, pension, or insurance plan, if such system or plan includes any provisions which require the retirement of any employee because of the age of such employee.*

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

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(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Act, other than the provisions of section 12(b) of this Act and the provisions of this section.

(g) (1) The Civil Service Commission shall undertake a study relating to the effects of the amendments made to section 12 of this Act and to this section by the Age Discrimination in Employment Act Amendments of 1977.

(2) The Civil Service Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1979.

EFFECTIVE DATE

SEC. 16. This Act shall become effective one hundred and eighty days after enactment, except (a) that the Secretary of Labor may extend the delay in effective date of any provision of this Act up to an additional ninety days thereafter if he finds that such time is necessary in permitting adjustments to the provisions hereof, and

APPROPRIATIONS

SEC. 17. There are hereby authorized to be appropriated such sums [, not in excess of $5,000,000 for any fiscal year,] as may be necessary to carry out this Act.

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ADDITIONAL VIEWS OF HONORABLE TED WEISS

Since 1967 the employment rights of older Americans—age 40 to 65—have been protected by the provisions of the Age Discrimination in Employment Act (ADEA). The thrust of committee amendments to the ADEA has been to expand coverage under the act in the Federal and private sectors. My efforts during our consideration of this issue have been directed toward the clarification of a provision in the original act—section 4(f)(2)—which has been used to evade the protections which this law offers. My amendments in committee were based on legislation which Representative Henry Waxman and I introduced in late April.

Section 4(f): Exceptions to the Act

Section 4(f) of the ADEA contains three exceptions to the provisions of the act. Section 4(f)(1) exempts employers, employment agencies, and labor organizations from the provisions of the act "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." This is generally meant to exclude workers in hazardous occupations. Section 4(f)(3) states that older workers can be discharged for good cause. While these two sections seem clear, there is a great deal of confusion about the meaning of section 4(f)(2); in its current form it reads as follows:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> "to observe the terms of a bona fide seniority ssytem or any bona fide employee benefit plan such as retirement, pension, or insurance plan which is not subterfuge to evade the purposes of this act, except that no such employee benefit plan shall excuse the failure to hire any individual";

Section 4(f)(2): Exception as Evasion

This provision was designed to increase the employment opportunities of older workers by making their hiring relatively easy; under section 4(f)(2) employers could hire older workers and benefit from their employment experience without having to incorporate them fully into company benefit plans or seniority systems. Some employers, however, have interpreted this provision as permitting mandated early retirement—prior to the upper age limit in the ADEA—as long as such a provision is incorporated into the terms of a benefit plan or retirement system. This clearly was not the intent of the original authors of the act.

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Original Intent Is as Clear in 1977 as it Was in 1967

Senator Jacob Javits, one of the principal original authors of the ADEA, recently introduced S. 1773, legislation similar to H.R. 5383 as amended, in the Senate. In his introductory remarks which appeared in the Record of June 28, 1977, Senator Javits alludes to conflicting court interpretations of section 4(f)(2) and offers a succinct clarification of that provision and the legislative history which precedes it. He states:

> "Section 4(f)(2) permits an exception to the ADEA's general age discrimination proscription by making it lawful to 'observe the terms of a . . . bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of the act.' *The purpose of this amendment was to facilitate the hiring of older employees by permitting their employment without necessarily providing equal benefits under employee benefit plans* (emphasis added) . . . Before the Supreme Court considers the arguments about what the Congress has intended by section 4(f)(2), I think it is incumbent that the Congress make clear that this provision was never intended to permit the wholesale evasion of the ADEA's protections . . . Union representatives will still be able to collectively bargain for decreases in the voluntary early retirement age under employee benefit plans."

In his presentation before the Subcommittee, Dr. Marc Rosenblum of the Center on Work and Aging of the American Institutes for Research, Washington, D.C., quoted from Senator Javits' statement at the original Senate hearings, held on March 15, 1967, concerning the ADEA; at the time Senator called for the adoption of amendments which would allow:

> That a fairly broad exception be provided for bona fide retirement and seriority systems that will facilitate rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems.

The Clarification Language

While the consistency of these two statements should eliminate any doubt concerning the intent of the original authors, I have sought to insure that the provision which is designed to encourage employment cannot be used against older workers by incorporating the following language (insert after individual):

> . . . and except that the involuntary retirement of any employee shall not be required or permitted by any such seniority system or any such employee benefit plan because of the age of such employee.

WITHOUT CLARIFICATION THE POTENTIAL FOR FUTURE ABUSE REMAINS

This report cites figures from the Bureau of Labor Statistics which indicate that 2 million Americans are covered by pension plans which permit employers to retire workers before age 65. Dr. Rosenblum in his presentation, told the subcommittee as of September 1973, some 324,000 workers were under plans which required compulsory retirement prior to age 65. A Library of Congress study on this issue indicates that mandatory retirement is closely associated with pension plan coverage; quoting "The Survey of New Beneficiaries, Social Security Bulletin, March 1972, the study shows that 80 percent of workers under mandatory retirement policies have pension plan coverage. While the present number of workers effected by the misinterpretation of section 4(f)(2) seems relatively small, the potential for abuse under this section is great.

POSSIBLE EFFECTS OF CLARIFICATION

During the course of our deliberations on H.R. 5383, several questions were raised by members and witnesses about the possible effects which my amendment would have on labor and pension related concerns. The following issues were raised:

Hazardous occupations.—Several members expressed the belief that unions and management should have the right to agree that in certain job classifications which are considered "dangerous" there could be mandatory retirement; examples which were cited included the coal and steel industries.

As previously indicated an exception is provided for hazardous occupations under section 4(f)(1) of the act. (It should be noted that the United Steel Workers have no policy of mandatory retirement and that they are expected to support this legislation as amended.)

Incompetence.—Witnesses from the Chamber of Commerce expressed the concern that a clarification of section 4(f)(2) would make it difficult to remove workers for cause.

As I indicated at the beginning of these views, section 4(f)(3) permits employers to "discharge or otherwise discipline" workers for good cause.

Effects on contracts.—Questions were raised concerning whether or not this provision will interfere with collective bargaining agreements.

This amendment does not effect any aspect of a collectively bargained agreement or pension plan except where there is a provision which would require mandatory retirement prior to the upper limit set by the act or the 1977 amendments. Unions, management, and workers will be free, under this amendment, to set the following: (1) age at which full benefits are received; (2) amount of benefits; (3) employer-employee contribution formulas; (4) early retirement options. Additionally, this amendment allows for a new area of collective bargaining: pension incentives to keep productive older workers on the job.

A second amendment which I offered and which was accepted by the committee permits pension plans under existing contracts to retain a mandatory retirement provision for workers age 65 to 70, for the duration of the contract or 2 years which ever comes first. It would not be permissible under this provision for labor and management to enter into new contracts which would force early retirement.

Loss of employment opportunities for younger workers.—The Chamber of Commerce in their testimony indicated that if the restrictions on pension systems were altered, younger workers would have an increasingly difficult time entering into and progressing within the labor force.

The trend in the labor force is towards early retirement. Workers tend to stay on the job until they are able to receive full benefits. Representatives from General Motors, in testimony before the House Select Committee on Aging, indicated that under GM's 30 years of service and out option, only 2 percent of their employees work to the corporation's mandatory retirement age of 68.

Dr. Rosenblum, in his remarks, stated that the labor force participation for workers over age 56 has been decreasing steadily over the last 25 years. In his prepared statement, he included a chart which illustrates this trend; it appears below:

MALE LABOR FORCE PARTICIPATION RATES, 1966 AND 1976, BY COLOR AND BY YEAR OF BIRTH

Males born in	White			Nonwhite		
	1966	1976	Decline	1966	1976	Decline
1932–41	97.5	96.0	0.5	95.5	90.6	4.9
1922–31	97.6	92.5	5.1	91.1	83.4	7.7
1912–21	95.8	75.4	20.4	90.7	65.7	25.0

Source: 1977 Employment and Training Report of the President.

One final point which can be made concerning younger workers is that they, too, will benefit from this legislation in the future.

ERISA.—Some members questioned whether this provision is in conflict with the Employment, Retirement, and Security Income Act (ERISA).

ERISA added certain funding, vesting, and insurance obligations to most pension plans. The amendment to section 4(f)(2) does not effect the cost or structure of bona fide pension plans which conform to ERISA or other IRS regulations. Further, it should be noted that ERISA does not require increased actuarial adjustments if an employee chooses to work beyond the ERISA-defined retirement age of 65.

Protecting Older Workers: A Legislative Responsibility

This report more than adequately illustrates the issue which will face the Supreme Court in their deliberations on *McMann* v. *United Airlines*. (542 F. 2d 217). It has been suggested that we should await

the decision of the Court before taking further action to clarify section 4(f)(2). If we were to find a provision in the Civil Rights Act of 1964 which was intended to advance the opportunities of those covered by the law but which was used against their advancement, we would act without haste. Likewise it is our legislative responsibility to move expeditiously when the rights of older workers are jeopardized by misapplication of the law. We cannot allow the very law which exists to protect the rights of older workers and the very provision which was written to expand their employment opportunities to be cited as the vehicle for mandated early retirement. Once we are aware of such a contradiction, our position as Members of Congress leaves us no option but to clarify the law without delay.

TED WEISS.

INDIVIDUAL VIEWS OF HON. JOHN N. ERLENBORN

The bill as reported out of full committee contains an amendment in section 2 which amends section 4(f)(2) of the Age Discrimination Employment Act of 1967. When this amendment to section 4(f)(2) was reported out by subcommittee it provided that involuntary retirement of any employee pursuant to a seniority or employee benefit plan would be illegal prior to age 70. However, the full committee has adopted an amendment to the subcommittee bill which would allow an exemption to this involuntary retirement prohibition for collectively bargained labor agreements which had been in effect at least 30 days prior to the date of enactment of this act. This exemption would continue until the expiration of the collectively bargained contract or in no event longer than 2 years.

It is not uncommon for one employer to have concurrently both union and nonunion pension plans. It is totally unfair to require a different compliance standard or time period under this new law for nonunion pension plans versus union pension plans. While the law requires nonunion pension plans to comply within 6 months, union pension plans may be exempt for a period of 2 years. The necessity of having to amend one plan within 6 months and another within 2 years will undoubtedly cause unnecessary confusion.

I will offer an amendment to allow nonunion pension plans the same treatment as union pension plans enabling both to come into full compliance within a 2-year period.

JOHN N. ERLENBORN.

Committee Consideration of Legislation

The Subcommittee on Labor of the Committee on Human Resources held public hearings on this legislation on July 26 and 27 of this year. The subcommittee completed consideration of S. 1784 on September 13 and approved an amended bill for action by the Committee on Human Resources. The committee met on September 30 and ordered H.R. 5383 reported with an amendment in the form of a substitute on that date.

Background

The Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA) was enacted to prohibit discrimination in employment on account of age in such matters as hiring, job retention, compensation, and other terms, conditions and privileges of employment. Its purpose is threefold: to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment.

The ADEA prohibits most employers, employment agencies, and labor organizations from discriminating in employment practices against persons between the ages of 40 and 65 on the basis of their age. The law applies to employers having 20 or more employees, public employers, employment agencies serving such employers, and labor organizations with 25 or more members.

The act also contains several exceptions to its provisions.

Section 4(f)(1) provides that the act's prohibitions against discrimination on the basis of age do not apply where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where differentiation is based on reasonable factors other than age.

Section 4(f)(2) provides that it is not lawful for an employer, employment agency, or labor organization to observe the terms of a bona fide seniority system or any bona fide employee benefit plan, such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of the act, except that no such plan may excuse an employer's failure to hire any individual.

Section 4(f)(3) provides that it is not unlawful to discharge or otherwise discipline an individual for good cause.

Need for This Legislation

When the Age Discrimination in Employment Act was enacted in 1967, comparatively little was known about the desires or abilities of older workers. The social and economic role of the aged in our national life was unclear as well.

In the ensuing decade, however, much of this uncertainty has been resolved. Scientific research now indicates that chronological age alone is a poor indicator of ability to perform a job.

Recent studies have demonstrated the important relationship between activity and good health. At the same time a new awareness has

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95TH CONGRESS, 1st Session } SENATE { REPORT No. 95-493

AMENDING THE AGE DISCRIMINATION IN EMPLOYMENT ACT AMENDMENTS OF 1977

OCTOBER 12 (legislative day, OCTOBER 11), 1977.—Ordered to be printed

Mr. WILLIAMS, from the Committee on Human Resources, submitted the following

REPORT

Together with
ADDITIONAL VIEWS

[To accompany H.R. 5383]

The Committee on Human Resources, to which was referred the bill, H.R. 5383, to amend the Age Discrimination in Employment Act (ADEA) of 1967 to protect older workers from involuntary retirement, to raise the age limitation for coverage under such act, and to provide for a study of the effects of changes in the age limitations for such coverage, having considered the same, reports favorably thereon with an amendment in the form of a substitute and recommends that the bill as amended do pass.

SUMMARY AND PURPOSE

The primary purpose of this legislation is to strengthen and broaden the provisions of the ADEA to insure that older individuals who desire to work will not be denied employment opportunities solely on the basis of age. This would be done by raising the current upper age limit of 65 in the ADEA to age 70, and by clarifying an existing section of the act to prohibit the mandatory retirement, pursuant to the terms of employee benefit plans or seniority systems, of individuals within the protected age group specified in section 12. Certain exemptions are specified. Protection against all forms of age discrimination now prohibited by the Age Discrimination in Employment Act would also be extended to older workers in the expanded age group. This legislation does not affect the upper age limit of the Act with respect to coverage of those Federal employees specified in section 15(a) of the act.

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developed concerning discrimination against the elderly, and public attention has focused on the equity and wisdom of mandatory retirement.

The committee believes that as a matter of basic civil rights people should be treated in employment on the basis of their individual ability to perform a job rather than on the basis of stereotypes about race, sex, or age. A person with the ability and desire to work should not be denied that opportunity solely because of age. The act's current age limitation unfairly assumes that age alone provides an accurate measure of an individual's ability to perform work. In fact, the evidence clearly establishes the continued productivity of workers who are 65 years of age and older. First, there were 2.7 million persons age 65 and older working in 1976. 1.6 million of them are 65 to 69 years of age and 1.1 million of them are age 70 and older. There are individuals who work into their eighties and even nineties. Second, there is substantial evidence that many workers can continue to work effectively beyond age 65 and may, in fact, be better employees because of experience and job commitment.

In studies conducted by the Bureau of Business Management of the University of Illinois in the early 1950's, supervisors rated over 3,000 workers aged 60 and over in 81 organizations in retailing, industrial, office and managerial positions. The supervisors considered a majority of their workers aged 60 and over to be as good as, or superior to, average younger workers with reference to absenteeism, dependability, judgment, work quality, work volume, and human relations. It also concluded that there is no specific age at which employees become unproductive and that satisfactory work performance may continue into the eigth decade.[1]

In 1974, 33 State agencies in New York compared workers over and under age 65 with regard to absenteeism, punctuality, on-the-job accidents, and overall job performance. Included in the survey were 3,707 employees between ages 65 and 70 (New York's mandatory retirement age for State employees). The results of the survey indicated that job performance of the workers over age 65 was "about equal to and sometimes noticeably better than younger workers."[2]

For capable older workers the retirement decision should be an individual option. Maximum freedom of choice should be given to employees in deciding when to retire, provided they are still physically and psychologically able to perform their jobs in a satisfactory manner. A 1974 Harris survey found that 86 percent of the public shared this view.

Mandatory retirement works severe injustices against the aged. For many, retirement income from public or private sources is unavailable or inadequate to support a comfortable existence. Indeed, for some, the opportunity to continue working has become a question of economic survival. In 1975, 14.6 percent of persons age 65 and older had annual incomes below the poverty level, compared to 11.6 percent of persons of all ages in low-income status. According to a 1974 Harris survey, the largest percentage of persons wanting to work after 65

[1] Robert L. Peterson, "3,000 Older Workers and Their Job Effectiveness," in Business Management Aids" (No. 15), University of Illinois, College of Commerce and Business Administration, Bureau of Business Management.
[2] New York State Commissioner of Human Rights, Jack M. Sable, quoted in "Job Survey Finds Aged Work Well," by David A. Andelman, *New York Times*, September 22, 1972, p. 43.

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were those who earned less than $3,000 a year. In other words, those who want to work beyond 65 are most often those who need to work in order to maintain a minimal standard of living.

The inadequacy of income maintenance programs for many older Americans is no longer seriously questioned. There is now widespread agreement that the present funding of the Social Security System is inadequate to meet future demands, because demographic projections suggest that proportionately fewer workers will be supporting a far greater number of retirees than has been the case in the past. Although the committee does not suggest that workers should be required to continue working beyond 65, this data suggests that we should not discourage those older Americans who wish to continue working.

Substantial evidence exists that mandatory retirement may have a severe deteriorative impact on the physical and psychological health of older individuals. Dr. Albert Gunn, assistant director for hospitals at the M. D. Anderson Hospital Rehabilitation Center, University of Texas in Houston, testified that mandatory retirement based on age often subjects workers to sudden and sometimes strong negative reactions that affect mental attitude, health and perhaps even longevity. It detracts from the quality of life by taking away a sense of fulfillment and self-sufficiency that many workers find can only be realized from productive employment. The American Medical Association opposes mandatory retirement. In its view, enforced idleness robs those affected of the will to live full, well-rounded lives, deprives them of opportunities for rewarding physical and mental activity. The AMA has observed that

> Arbitrary segregation of individuals because of arbitrarily determined chronological age is not healthy for the nation or the individual. The sudden cessation of productive work and earning power of an individual, caused by compulsory retirement, often leads to physical and emotional illness and premature death.

Society as a whole suffers from mandatory retirement. In hearings before the House Select Committee on Aging, Professor James Schulz of Brandeis University testified that mandatory retirement of willing and able employees costs the nation three-tenths of 1 percent of its annual gross national product. This represents 4.5 billion 1976 dollars.

The committee believes that the arguments for retaining existing mandatory retirement policies are largely based on misconceptions rather than upon a careful analysis of the facts.

It has been argued that raising the mandatory retirement age would greatly increase the labor force participation rates of older workers and thereby reduce employment opportunities for younger workers. This committee is very much concerned about the present unemployment rate among the young. However, estimates by the Department of Labor indicate that if mandatory retirement had been prohibited for all workers under 70 years of age in 1976, the male labor force would have increased by only one-tenth to two-tenths of a percent. For the female labor force the figure would have been one-tenth of a percent. This represents an increase in the labor force of approximately 200,000 per year.

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THE EFFECT ON PENSION PLANS AND OTHER EMPLOYEE BENEFITS FOR PEOPLE WHO CHOOSE TO WORK BEYOND AGE 65

The argument that pension and other employee benefit plan costs would increase if the act's upper age limit is increased has not been substantiated. At the hearings on this legislation, Donald Elisburg, Assistant Secretary of Labor for Employment Standards, assured this committee that officials in the Department of Labor who administer ERISA are in complete agreement that "there would be no interference with the relevant provisions of the 1974 pension law if the upper age limit were raised * * * "

This legislation would not change the definition of normal retirement age under ERISA. It does not require the accrual of additional benefits or the payment of the actuarial equivalent of normal retirement benefits to employees who choose to work beyond the plan's normal retirement date.

Included in this report is a letter from Assistant Secretary Elisburg responding in detail to questions from the Chairman and ranking minority member of the committee on the relationship between ERISA and the proposed amendments to the ADEA which reaffirms the committee's intent in this regard.

Concerns were also expressed regarding potential increased costs for employee welfare benefit plans such as disability, health, life and other forms of insurance for employees. Presently some employers reduce coverage for older workers under these plans or increase the required employee contribution as workers advance in age. This bill would not alter existing law with respect to these practices. Existing principles of law, including the 4(f)(2) bona fide employee benefit plan exception, as modified by these amendments, would be the standard by which these practices will be evaluated.

FEDERAL-STATE RELATIONSHIP UNDER THE ADEA

During the Committee's consideration of this legislation, there was some discussion about whether or not the ADEA preempts State age discrimination laws. The interrelationship between enforcement of the federal Age Discrimination in Employment Act and the enforcement of State statutes prohibiting age discrimination in employment is dealt with in Section 14 of the ADEA. Section 14(a) of the ADEA provides:

> Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of an action under this Act such action shall supersede any State action.

As this language makes clear, the ADEA does not preempt State laws.

When Congress originally enacted the ADEA it intended that the States should retain the power to act in the area of age discrimination in employment. At that time then Secretary of Labor Wirtz specifically said that the original Administration proposal was designed to

"preserve and encourage State legislation for coping with [the age discrimination in employment] problem" (letter to the Speaker of the House reprinted in 113 Congressional Record 1377 (January 24, 1967)). The approach in Section 14 of the ADEA is in accord with the general principle recognized by the Supreme Court that in the field of employment practices States possess broad authority under their police powers. Accordingly, States are free to pass their own age discrimination laws. Most States have done so, and in many instances their provisions do differ from the ADEA in some respects. For example, while the ADEA does not protect individuals less than 40 years old, some State laws (Michigan, New York and Oregon) protect individuals down to the age of 18. Likewise, while the ADEA does not apply to any employer having fewer than 20 employees, some State laws have no such restriction.

States are also free to enforce their laws at the same time that the federal government is enforcing the ADEA. However, there are two exceptions to simultaneous enforcement, one in Section 14(a) the other in Section 14(b).

The last part of Section 14(a) states that "upon commencement of action under this Act such action shall supersede any State action." The manner in which a lawsuit under the ADEA would supersede a lawsuit under a State age discrimination law is explained in the committee reports in 1967. As stated in those reports, "commencement of an action under this act shall be a stay on any State action previously commenced" (S. Report No. 723, 90th Congress, 1st Session (1967) at pp. 6, 11; H.R. Report No. 805, 90th Congress, 1st Session (1967) at pp. 6, 11). In other words, if a lawsuit under a State age discrimination law is pending at the time a suit under the ADEA is filed, the State lawsuit would have to be immediately held in abeyance, pending a final resolution of the federal litigation or a determination that the federal and State actions are not coterminous in nature.

Section 14(b) of the Act provides that where an act of discrimination occurs in a State which has an age discrimination law and an agency empowered to grant or seek relief from such discriminatory practices, no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been commenced under State law, unless such proceedings have been earlier terminated. This provision requires that if the individual chooses to apply first to the State agency for relief he must give the State the prescribed minimum period in which to take remedial action before he may turn to the federal courts for relief under the ADEA. The provision does not require that the individual go to the State first in every instance.

Several courts have properly recognized this distinction. See e.g., *Smith* v. *Jos. Schlitz Brewing Company*, 419 F. Supp. 770, 774 (D. N.J. 1976); *Vazquez* v. *Eastern Air Lines*, 405 F. Supp. 1353, 1356 (D. P.R. 1975); *Bertrand* v. *Orkin Exterminating Company*, 419 F. Supp. 1123, 1126 (N.D. Ill. 1976); *Goger* v. *H. K. Porter Company*, 492 F. 2nd 13, 17–18 (C.A. 3, 1974) (Garth, J., concurring).

Other courts, however, have ruled that the complainant must go initially to the State authorities in every instance, and that the failure to do so requires dismissal of the federal action. See *Vaughn* v. *Chrysler Corp.*, 832 F. Supp. 143 (E.D. Michigan 1974); *Smith* v. *Crest Com-*

munities, Inc., 8 FEP Cases 1328 (W.D Ky 1974); *Fitzgerald* v. *New England Tel. & Tel. Co.*, 416 F. Supp. 617 (D. Mass. 1976); see also *Goger* v. *H.K. Porter Co.*, 492 F. 2d 13 (C.A. 3, 1974).

It is the committee's view that an individual who has been discriminated against because of age is free to proceed either under state law or under federal law. The choice is up to the individual. However, as Section 14(b) makes clear, if the individual does choose to proceed initially under State law, he must give the State agency at least 60 days to take remedial action before he may commence a federal action.

Discussion of Principal Provisions

INCREASING THE UPPER AGE LIMIT TO 70

This bill would amend section 12 of the Age Discrimination in Employment Act to raise the upper limit from 65 to 70, effective January 1, 1979. The delay in the effective date of this provision is intended to provide sufficient opportunity for employers to adjust personnel policies to reflect the changes in existing law made by these amendments.

Although considerable sentiment was expressed in favor of removing the Act's upper age limit, the committee concluded that, for the present, the act's upper age limitation should not be extended beyond 70 years of age. An increase in the upper age limit from 65 to 70 is supported by the evidence presented at the Labor Subcommittee hearings. Research studies conducted in the last ten years concerning the job capacity and health of older workers have focused on those between ages 60 to 70. Equivalent research for workers older than 70 years of age has only recently been undertaken, and results are as yet unavailable. The Labor Department study required by this legislation will focus on the need for and likely effect of uncapping the act. The committee felt it should not address this question until this information has been developed.

Raising the age limitation from 65 to 70 is in itself a significant step, because it provides protection for the vast majority of older workers who, the evidence suggests, are facing mandatory retirement and who wish to continue working. A Civil Service Commission study of Federal employees, who are protected from mandatory retirement until age 70, found that only 1,509 Federal workers were retired at age 70 in fiscal year 1976. This study suggests and the committee anticipates that there will be declining rates of labor force participation by workers between 65 and 70 years of age and that very few employees will choose to work until 70.

THE EXEMPTION FOR MANAGEMENT OR HIGHLY COMPENSATED EMPLOYEES

During the committee's deliberations, concerns were expressed regarding the impact that the elimination of mandatory retirement would have on the ability of employers to assure promotional opportunities for younger workers.

Therefore, in order to permit employers to replace certain key employees and to keep promotional channels open for younger employees, the committee adopted an amendment offered by Senator Pell which

would permit compulsory retirement of highly compensated management employees at age 65, or above if they will receive an employer-provided annual retirement benefit of at least $20,000, exclusive of social security.

In calculating this annual retirement benefit, lump sum distributions or installment distributions from a pension, profitsharing, savings or deferred compensation plan, or any combination thereof, may be included so long as the value of such benefits is actuarially adjusted to reflect the equivalent of a straight life annuity of $20,000 per year.

In applying the retirement income test, the committee intends that if a retirement benefit is in a form other than a straight life annuity, such benefit shall be adjusted in accordance with regulations issued by the Secretary of Labor, in consultation with the Secretary of the Treasury, and shall exclude from the calculation of the $20,000 (or subsequently adjusted figure) the value of the employee's contribution to such plan or the contributions of a former employer via rollover contributions. This will insure that the employee's retirement income will be adjusted to reflect the level of retirement income actually provided by the employer wishing to initiate compulsory retirement. Any adjustment in the retirement income test provided for by this section must be based upon reasonable actuarial assumptions.

The amendment provides that the $20,000 figure will be adjusted annually by the Secretary of Labor to reflect increases or decreases in the cost of living. The purpose of the cost-of-living adjustment is to insure that in future years an employee subject to this provision will receive the equivalent of $20,000 in 1977 dollars. An employee meeting the requirements of the amendment at the time of his retirement need not be rehired or reinstated merely because the retirement income test is no longer satisfied as a result of subsequent adjustments made by the Secretary.

The committee intends that the Secretary shall use his section 9 rulemaking authority to interpret and implement the exemptions established by section 6 of this bill for management or highly compensated employees, college professors and elementary and secondary public school teachers. In particular, the Secretary is directed to define the term "select group of management or highly compensated employees" as that term appears in section 6(b)(1) of the bill. The committee intends that the definition of this term shall apply only to the Age Discrimination in Employment Act of 1967 as amended. It shall not apply or have any effect on other Federal statutes, including but not limited to, the Employee Retirement Income Security Act of 1974.

THE EXEMPTION FOR CERTAIN EMPLOYEES OF EDUCATIONAL INSTITUTIONS

During the committee's consideration of this bill two amendments were proposed and accepted which recognize a special type of employer/employee relationship in educational institutions. The amendments permit limited exceptions to the ban on mandatory retirement for these employees.

Many colleges and universities maintain that for the foreseeable future the number of available faculty positions will be closely related to the number of retirements, thereby making it difficult to employ

younger professors, particularly women and minorities. Moreover, the financial burden on already hard-pressed institutions of higher learning may be increased by this legislation, because it may require the retention of highly paid senior employees for additional years.

Concerns were expressed by the committee that although it is theoretically possible to discharge tenured faculty for cause, the difficulty of objectively evaluating the performance of such employee makes such good cause discharges difficult. The committee therefore adopted an amendment offered by Senator Chafee to permit colleges and universities to maintain compulsory retirement policies for faculty at age 65 or above who are serving under a contract of unlimited tenure or similar arrangement providing for unlimited tenure.

Because of the belief that unlimited tenure systems create similar problems for public schools, the committee adopted an amendment permitting compulsory retirement of teachers in such institutions at age 65. Many States presently provide for mandatory retirement of public employees at ages greater than 65. In the committee's view, such States should not reduce the mandatory retirement age under these statutes for the purpose of taking advantage of this provision. Accordingly, the amendment prohibits the application of the exemption to public school teachers in a State which has a mandatory retirement age greater than 65 on the date of enactment of this legislation.

BONA FIDE EMPLOYEE BENEFIT PLANS AND SENIORITY SYSTEMS

Mandatory retirement provisions are often associated with pension plans. According to a 1974 Bureau of Labor Statistics study of pension plans, 41 percent of the workers covered by private pension plans were subject to mandatory retirement. Raising the act's upper age limit would be an empty gesture if employees remained subject to mandatory retirement because of provisions contained in collective bargaining agreements or employee benefit plans.

Section 4(f)(2) of the act permits an exception to the ADEA's general age discrimination prohibition by making it lawful "to observe the terms of * * * any bona fide employee benefit plan * * * which is not a subterfuge to evade the purposes of the Act." The purpose of this exception was to facilitate the hiring of older employees by permitting their employment without necessarily providing equal benefits under employee benefit plans.[3]

The reports of the Committee on Eduction and Labor and the Senate Committee on Labor and Public Welfare on the Age Discrimination in Employment Act of 1967 contain identical language explaining the exception in section 4(f)(2).

> This exception serves to emphasize the primary purpose of the bill—the hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans.

[3] Section 4(f)(2) provides: "(f) It shall not be unlawful for an employer, employment agency, or labor organization—
"(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual":

During the Senate debate, Senator Yarborough, the floor manager of the bill, stated that this section "* * * will not deny any individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement or insurance plan." Senator Javits at the time stated:

> "An employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers."

Despite this clear explanation of legislative intent, there is at present a conflict in the courts over the interpretation of this section. The third and fifth circuits have ruled that a pension plan which requires mandatory retirement prior to age 65 does not violate the act, because such a provision is sanctioned by section 4(f)(2). *Zinger* v. *Blanchette*, 549 F. 2d 901 (3d cir. 1977); *Brennan* v. *Taft Broadcasting*, 500 F. 2d 212 (5th cir. 1974).

The *Tart* court found the language of the section unambiguous and refused to consider the legislative history. It concluded, erroneously in the committee's view, that a plan could not be a subterfuge within the meaning of section 4(f)(2) if it was operative before the effective date of the act. In *Zinger*, the third circuit distinguished between discharge and mandatory retirement on a pension, in ruling against a plaintiff who had been mandatorily retired. The court held that there is no statutory prohibition against retirement on a pension, and so long as the retirement benefits are substantial, the forced retirement would not be a "subterfuge to evade the purposes" of the act. We also disagree with the third circuit's interpretation of this section. In the committee's view, forced retirement extinguishes an individual's right to employment and is thus not excused by section 4(f)(2) unless the retirement is based on some reason other than age, such as disability or poor performance.

In *McMann* v. *United Airlines*, 542 F. 2d 217 (4th cir. 1976) cert. granted 429 U.S. 1090 (1977), the Fourth Circuit Court of Appeals held that section 4(f)(2) did not permit mandatory retirement pursuant to the terms of a collective bargaining agreement or pension plan. To rule otherwise, the Court said, would undermine the intent of Congress, because the purpose of 4(f)(2) was to encourage the employment of older workers by permitting employees to make distinctions based on age with respect to participation in employee benefit plans.

Because of the large number of pension plans which require mandatory retirement and the uncertainty of the outcome of court deliberations on the meaning of section 4(f)(2), congressional action to clarify our original intent. The amendment to section 4(f)(2) serves to express congressional approval of the result reached by the fourth circuit in *McMann*.

AMENDMENT TO SECTION 4(f)(1)

The committee intends to make clear that under this legislation an employer would not be required to retain anyone who is not qualified to perform a particular job. For example, in certain types of particularly arduous law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age

would be unable to continue to perform safely and efficiently the duties of their particular jobs, and it may be impossible or impractical to determine through medical examinations, periodic [illegible] of current job performance and other objective tests the employee's capacity or ability to continue to perform the job safely and [illegible].

Accordingly, the committee adopted an amendment to make it clear that where these two conditions are satisfied and where such a bona fide occupational qualification has therefore been established, an employer may lawfully require mandatory retirement at that specified age. The committee also expressed its concern that litigation should not be the sole means of determining the validity of a bona fide occupational qualification. Although the Secretary is presently empowered to issue advisory opinions on the applicability of BFOQ exception. The committee recommended that the Secretary examine the feasibility of issuing guidelines to aid employers in determining the applicability of section 4(f)(1) to their particular situations.

EXEMPTION FOR COLLECTIVELY BARGAINED PLANS

During the full committee's consideration of this bill, an amendment was adopted which defers the effective date of the prohibition of mandatory retirement policies at ages 65 through 69 in employee benefit plans and seniority systems contained in collectively bargained agreements in effect on September 1, 1977. The effective date of the prohibition in these situations would be the termination of the contract or January 1, 1980, whichever occurs first. The reason for the extended effective date for collectively bargained employee benefit plans is to recognize, and provide the maximum deference to, contracts negotiated between management and labor, consistent with the committee's desire to end mandatory retirement of those workers under age 70. The committee recognizes that these contracts were negotiated in good faith and that reciprocal agreements and concessions were made in exchange for the mandatory retirement provision. This delay will give management and labor an opportunity to make clarifications, as required by the change, in pension plan agreements. This postponed effective date would only apply to pension plans which were negotiated as a part of a collective bargaining agreement. The table below sets forth the dates when the mandatory retirement provisions of a seniority system or employee benefit plan could no longer be applied.

Plans requiring mandatory retirement at ages 65 through 69: Collectively bargained plans in effect September 1, 1977: January 1, 1980, or at the expiration of negotiated agreements, whichever comes first.

All other plans requiring mandatory retirement at ages 65 through 69: January 1, 1979.

STUDY BY THE SECRETARY OF LABOR

The legislation requires a Department of Labor study to be conducted on the effect of revising the upper age limit to 70 years of age the feasibility of raising the limit above 70 years of age; and the feasibility of lowering the minimum age for coverage under the ADEA. As reported, the bill requires the Secretary to complete the study

within three years of the ctive date. An interim report would be due two years after the ef ve date.

As was noted earlier, studies on the capacities of workers over the age of 70 have not yet been completed. Because of the interest that has been expressed concerning total uncapping of the act, it is the committee's desire to have the results of the Labor Department study available by the time this research is concluded. Together these reports may provide the evidence which will facilitate early consideration of uncapping the act entirely.

These amendments also direct the Secretary of Labor to study the question of age-related employment discrimination as it affects persons younger than 40 years of age, the act's present lower age limit. The committee contemplates that this aspect of the study will focus primarily on persons 30 to 40 years of age. The DOL study should consider the potential impact which lowering the act's minimum age may have on protecting the class of persons presently covered.

Procedural Amendments

The committee has included in the bill two procedural amendments to the act. The purpose of these amendments is to make it more likely that the courts will reach the merits of the cases of aggrieved individuals and do so more expeditiously.

a. 180-day notice of intent to sue

Section 7(d) of the act provides that before any individual may institute a lawsuit, he or she must give the Department of Labor notice of intent to file suit within 180 days of the occurrence of the alleged unlawful practice. This period is extended to 300 days if the alleged unlawful practice takes place in a State which has an age discrimination statute under which a State agency is empowered to grant or seek relief from age discrimination. This time limit within which to notify the Department runs concurrently with the act's 2- or 3-year statute of limitations on the recovery of back wages.

The basic purpose of the notice requirement is to apprise the Department of Labor of any alleged violations of the Act so that the Department may notify prospective defendants and to provide the Department with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation.

Failure to timely file the notice as required by section 7(d) has been the most common basis for dismissal of ADEA lawsuits by private individuals. The 180-day limit has been interpreted as jurisdictional by some courts, and consequently complaints are dismissed. See e.g., *Ott* v. *Midland-Ross Corp.*, 523 F. 2d 1367 (6th Cir. 1975); *Hiscott* v. *General Electric Co.*, 521 F. 2d 632 (6th Cir., 1975), and *Powell* v. *Southwestern Bell Telephone Co.*, 494 F. 2d 485 (5th Cir., 1974).

In the committee's view, this provides a compelling argument for removing the 180-day notice requirement entirely. Age discrimination is often much more subtle and less well understood than other forms of discrimination and therefore is often not discovered by the victim until long after the alleged act has occurred. Furthermore, under this amendment, neither the complainant who fails to file a notice within 180 days nor the prospective defendant will have to go

through the prolonged uncertainty they now experience in waiting for the court to rule whether or not the failure to file the notice within 180 days may be excused.

b. Tolling of the statute of limitations during conciliation

This legislation also provides for the tolling of the statute of limitations for the period during which, pursuant to section 7(b) of the act, the Department of Labor making informal attempts to bring about voluntary compliance with the act. Section 7(b) provides, in pertinent part:

> Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

Various courts have held that the failure to comply with the conciliation requirement in section 7(b) requires dismissal of the lawsuit. Some courts have gone so far as to say that conciliation is a "jurisdictional prerequisite" to bringing a lawsuit under the Act. (See *Dunlop* v. *Resources Sciences Corp.*, 410 F. Supp. 836, 843 (N.D. Okla. 1976); *Usery* v. *Sun Oil Company (Delaware)*, 423 F. Supp. 125, 128 (N.D. Tex. 1976).

It is the committee's intent that the conciliation requirement in section 7(b) should not be so rigidly applied. In *Brennan* v. *Ace Hardware Corp.*, 495 F. 2d 368 (C.A. 8, 1974), the court reflected a proper understanding of the conciliation requirement in rejecting the employer's argument that the statutory directive is a "condition precedent to the court entertaining jurisdiction of the legal action." In that case the court correctly noted that section 7(b) grants to district courts the equitable discretion to stay lawsuits pending before them in order to permit conciliation to be completed before the lawsuit continues. The claim of discrimination ought to be decided on the merits through litigation in the event the conciliation process fails.

In order to assure that such a resolution on the merits will occur, the legislation provides that the statute of limitations will be tolled during conciliation carried out pursuant to section 7(b).

It is the intent of this amendment to prevent those who have violated the Act from delaying and postponing conciliation and thereby possibly avoiding liability.

U.S. SENATE,
COMMITTEE ON HUMAN RESOURCES,
Washington, D.C., August 29, 1977.

Mr. DONALD ELISBURG,
Assistant Secretary for Employment Standards, U.S. Department of Labor, Washington, D.C.

DEAR MR. ELISBURG: During your testimony before the Labor Subcommittee concerning proposed amendments to the Age Discrimination in Employment Act of 1967 (ADEA), you stated that raising the ADEA age limit would not create any conflicts with respect to the Employee Retirement Income Security Act of 1974 (ERISA). Other witnesses suggested that this may not be the case.

In order to aid us in our deliberations, we would appreciate a written opinion from the Department addressing all potential conflicts between ERISA and the proposed amendments to the ADEA, and answering the following questions:

1. Would an employer be required to credit years of service for purposes of benefit accrual after normal retirement age?

2. Would an employer be required to pay the actuarial equivalent of normal retirement benefits to an employee who continues to work beyond the normal retirement age?

3. If the upper-age limit is raised, some employees who choose to work beyond age 65 will be participants in plans which provide for the commencement of retirement benefits at age 65. Could such plans be amended to provide that retirement benefits would commence at the actual date of retirement without violating the ADEA or ERISA?

4. Would an increase in the upper-age limit of the ADEA increase the funding costs for private pension plans?

5. Assuming that under ERISA a plan need not provide for benefit accruals for an employee who continues to work after the normal retirement age, would an employer's failure to provide for the accrual of benefits for such an employee constitute age discrimination under the ADEA?

As you know, the Subcommittee has scheduled a markup of the proposed legislation for September 8, 1977. We would, therefore, appreciate a response as soon as possible.

With best wishes,

Sincerely,

HARRISON A. WILLIAMS, Jr.,
Chairman.

JACOB K. JAVITS,
Ranking Minority Member.

U.S. DEPARTMENT OF LABOR,
OFFICE OF THE ASSISTANT SECRETARY
FOR EMPLOYMENT STANDARDS,
Washington, D.C.

Hon. HARRISON A. WILLIAMS, Jr.,
Chairman, Committee on Human Resources,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your and Senator Javits' letter of August 29, 1977, in which you request the Department's response to a number of questions concerning any potential conflicts between the Employment Retirement Income Security Act of 1974 (ERISA) and the proposed amendments to the Age Discrimination in Employment Act of 1967 (ADEA).

As I indicated in my testimony before the Senate Labor Subcommittee, raising the upper age limit of the ADEA would not create any conflict with ERISA. Those responsible for administering ERISA in the Department of Labor are in complete agreement that the proposed amendments would not interfere with any of the provisions of ERISA.

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The following represents the Department's answers to your specific questions:

Question 1. Would an employer be required to credit years of service for purposes of benefit accrual after normal retirement age?

Answer. It is our view that nothing in the ADEA or in the proposed amendments would require an employer to credit, for purposes of benefit accrual, those years of service which occur after an employee's normal retirement age. ERISA likewise does not require such accrual. There is a section in ERISA which limits the extent to which a plan may provide for the accrual of benefits at a higher rate during later and presumably higher paid years of service. This provision, section 204, sets forth three alternative tests, one of which a plan must meet in order to demonstrate that benefits are being accrued properly (29 U.S.C. 1054). Two of these tests (the 33⅓ percent test and the fractional test) explicitly permit a plan to provide that no benefits will accrue after normal retirement age (26 CFR 1. 411(2)–1). The third test requires the accrual of benefits after normal retirement age. It should be noted, however, that no employer is required to select the third test, provided that he satisfies one of the two other tests.

Question 2. Would an employer be required to pay the actuarial equivalent of normal retirement benefits to an employee who continues to work beyond the normal retirement age?

Answer. No. There will not have to be any adjustment in the size of the periodic payments at the time of actual retirement. This is also the case under ERISA. See the final regulations issued by the Internal Revenue Service under section 411 of the Code and section 204 of ERISA which provide that no adjustment to an accrued benefit is required on account of employment after normal retirement age [(26 CFR, section 1.411(c)–1(f)(2))]

Question 3. If the upper age limit is raised, some employees who choose to work beyond age 65 will be participants in plans which provide for the commencement of retirement benefits at age 65. Could such plans be amended to provide that retirement benefits would commence at the actual date of retirement without violating the ADEA or ERISA?

Answer. Generally, pension plans condition the payment of benefits on actual retirement. Thus, it would not be necessary to amend these plans since neither they nor the ADEA nor ERISA require the payment of retirement benefits to employees who continue to work beyond normal retirement age. The requirement in ERISA (section 206(a)) is that benefits must commence at normal retirement age or on the actual date of retirement, whichever is later (29 U.S.C. 1056). Of course, if there are some plans which provide for the payment of pension benefits at a specified age, regardless of actual retirement, such plans could be amended without violating either the ADEA or ERISA.

Question 4. Would an increase in the upper age limit of the ADEA increase the funding costs for private pension plans?

Answer. An increase in the upper age limit of the ADEA would not increase the funding costs for private pension plans. As a matter of fact, financial pressure on private pension plans could be alleviated. Requiring an employer to permit a qualified employee to work until

the Act's upper age limit, regardless of the pension plan's normal retirement age, would result in cost savings to plans rather than increases. As an actuarial matter, the longer an employee works, the shorter the period retirement payments will have to be made, thus lowering the funding assumptions of the plan. Savings would of course come from the added years of accumulated interest on the fund. Savings would also stem from the fact that, as indicated above, a plan need not provide for further accrual of benefits after the participant has reached the plan's normal retirement age, and thus the added years of service do not increase the ultimate retirement benefit or the cost of providing it.

It is possible that certain plans, such as those which provide for the accrual of benefits after normal retirement age, will not experience these savings. However, there will be no significant cost increase to these plans. Any increases in benefits due to such factors as salary increases after employees have attained normal retirement age would generally be offset by factors such as the shorter life expectancy of employees upon retirement after normal retirement age, interest earned on plan assets during the period between normal retirement age and the age at which employees actually retire, and increases in pre-retirement mortality.

Question 5. Assuming that under ERISA a plan need not provide for benefit accruals for an employee who continues to work after the normal retirement age, would an employer's failure to provide for the accrual of benefits for such an employee constitute age discrimination under the ADEA?

Answer. In our opinion, a bona fide pension plan that provides that no benefits accrue to a participant who continues service with the employer after attainment of normal retirement age would not violate the ADEA. Under Section 4(f)(2) of the ADEA, it is not unlawful to observe the terms of a bona fide pension plan that is not a subterfuge to evade the purposes of the ADEA. As I noted in my testimony, the legislative history of the ADEA indicates that Section 4(f)(2) was intended to allow age to be considered in funding a plan and in determining the level of benefits to be paid. We believe that it will run counter to the intent of the Act to require a plan to provide for benefit accrual after the plan's normal retirement age.

I might also note that the proposed amendments to the upper age limit in Section 12 of the ADEA would in no manner affect the definition of the term "normal retirement age" in Section 3(24) of ERISA.

I hope these responses to your questions will be helpful to the subcommittee.

Sincerely

DONALD ELISBURG,
Assistant Secretary.

TABULATION OF VOTES

LABOR SUBCOMMITTEE

Senator Williams' amendment in the nature of a substitute to S. 1784, as introduced. (Adopted by unanimous voice vote.)

The bill, as amended, was ordered reported to the committee by unanimous voice vote.

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FULL COMMITTEE

Senator Williams' amendment to delay the effective date of the increase in the Act's upper age limitation from 65 to 70 until January 1, 1979. (Adopted by unanimous voice vote.)

Senator Williams' amendment to clarify section 4(f)(1) to permit mandatory retirement where age has been shown to be a bona fide occupational qualification. (Adopted by unanimous voice vote.)

Senator Pell's amendment to permit employers to maintain compulsory retirement policies for certain management and highly compensated employees who will receive an annual nonforfeitable retirement benefit equivalent to at least $20,000, at an age not less than 65. (Adopted by voice vote.)

Senator Chafee's amendment to permit colleges and universities to maintain compulsory retirement policies, for faculty serving under a contract of unlimited tenure, at an age not less than 65. (Adopted by voice vote.)

An amendment proposed by Senator Hathaway to permit the mandatory retirement of certain elementary and secondary school teachers at age 65 who are serving under a contract of unlimited tenure. (Adopted 8–5.)

YEAS	NAYS
Mr. Pell	Mr. Williams
Mr. Kennedy	Mr. Randolph
Mr. Eagleton	Mr. Cranston
Mr. Hathaway	Mr. Reigle
Mr. Schweiker	Mr. Javits
Mr. Hatch	
Mr. Chafee	
Mr. Hayakawa	

H.R. 5383, with an amendment in the form of a substitute, was ordered reported to the Senate by unanimous voice vote.

OCTOBER 4, 1977.

Ms. ALICE M. RIVLIN,
Director, Congressional Budget Office,
U.S. Congress, Washington, D.C.

DEAR MS. RIVLIN: Pursuant to the requirements of Section 252 of the Legislative Reorganization Act, the Committee on Human Resources, Subcommittee on Labor requests a cost estimate of S. 1784, a bill to amend the Age Discrimination in Employment Act of 1967 to protect older workers from involuntary retirement, to raise the age limitation of coverage under such Act and to provide for a study of the effects of changes in the age limitation. The bill was reported with amendments on September 30, 1977.

For your information I have enclosed a copy of the bill and will greatly appreciate your assistance in providing the necessary information.

Sincerely,

HARRISON A. WILLIAMS, JR.,
Chairman.

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CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS,
Washington, D.C., October 12, 1977.

Hon. HARRISON A. WILLIAMS, Jr.,
Chairman, Committee on Human Resources,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for S. 1784, the Age Discrimination in Employment Amendments of 1977.

Should the committee so desire, we would be pleased to provide further details on the attached cost estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number: S. 1784.

2. Bill title: Age Discrimination in Employment Amendments of 1977.

3. Bill status: Reported as H.R. 5383 amended, by the Senate Committee on Human Resources, September 30, 1977.

4. Purpose of bill: The primary purposes of this bill are: (1) To change the age limits of the class of individuals to whom the provisions of the 1967 Act, as subsequently amended, apply to individuals at least 40 years of age but less than 70 years of age; (2) to prohibit nonfederal employers, labor organizations, etc. (but with certain exemptions), from observing the terms of seniority systems or employee benefit plans which require or permit the involuntary retirement of individuals on the basis of age; (3) to provide for a study of the effects of changes in the age limitation of coverage.

5. Cost estimate:

Department of Labor projected total outlays

[In millions of dollars]

Fiscal year:	*Enforcement Costs*
1978	0.4
1979	0.4
1980	0.5
1981	0.5
1982	0.5

6. Basis for estimate:

Enforcement costs.—These figures represent additional enforcement costs expected to result from the expanded applicability of the protection of the Act. In fiscal year 1977, $2.5 million was authorized to the Department of Labor for enforcement. In view of the relative sizes of the population aged 40–64 and 40–69, we estimate that enforcement costs would increase by 15 percent as a consequence of the amendment. Because all enforcement costs are for salaries and expenses, future costs are projected on the basis of CBO forecasts of the General Federal Pay Schedule, and a spend-out rate of [illegible] is assumed.

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Study costs.—The bill extends the scope of the study to be undertaken by the Secretary of Labor, but it is anticipated that these studies will be performed by existing staff; hence no cost is attributed to these provisions.

No estimate has been made of the possible effects of the legislation on social security outlays or receipts because of the lack of recent and reliable information to make such an estimate. Social security cost impacts would depend on the behavior of both employers and employees. The change in age limits will have the effect of allowing a particular subgroup of the working population to retire later than they are currently permitted under existing mandatory retirement policies. The size of this subgroup, let alone the fraction thereof which would take advantage of the opportunity to work longer, cannot be determined from available data. Moreover, even if these variables could be predicted, there is no presumption as to how the labor market would respond. For example, would employers substitute older for younger workers or would wages be depressed as a result of an expanded workforce? Both receipts and payments of the social security system depend upon the precise configuration of the covered workforce—its size, composition and earnings structure—as well as the timing of retirement, and the benefit entitlements of retirees. Given our current knowledge, any estimate would be subject to a very wide margin of error. Some social security savings are likely to result as a consequence of the legislation because some workers will forego private pensions and part or all of their social security benefits in order to continue working. But it is impossible to specify what the savings would be at this stage.

7. Estimate comparison: None.

8. Previous CBO estimate: See estimate of H.R. 5383 (July 18, 1977) which covers a broader segment of employment than S. 1784.

9. Estimate prepared by: June O'Neill.

10. Estimated approved by:

C. K. NUCKOLS
(For James L. Blum,
Assistant Director for Budget Analysis.

REGULATORY AND PAPERWORK IMPACT

Pursuant to the requirements of section 5 of rule XXIX of the Standing Rules of the Senate, the committee estimates that this legislation would expand the class of protected persons under the ADEA from approximately 36 million to 38 million. The Congressional Budget Office estimates that increasing the act's upper age limitation will result in additional enforcement costs because of the expanded applicability of the act's protection.

This legislation requires the Secretary of Labor to issue regulations with respect to the exception contained in section 6(f) for management and highly compensated employees. The Secretary will also be required to conduct a study of the effect of increasing the act's upper age limit.

The question of the economic impact of this legislation on individuals and businesses which will be affected has been a major focus of

committee deliberations. Accordingly, the committee's judgments on these issues are discussed in the body of the report. The committee has concluded that the economic impact of the legislation will not be significant and that whatever costs do occur will be readily absorbed. This legislation will require the review of many employee benefit plans, and as a result some plans will have to be amended. While the committee believes that this will entail some additional cost, it does not believe that these costs will be significant.

In the committee's view, the legislation will have no impact on personal privacy and no substantial additional paperwork will result from this legislation.

Section-by-Section Analysis

SECTION 1. SHORT TITLE OF THE ACT

This section provides that the act may be cited by the short title: "Age Discrimination in Employment Amendments of 1977".

SECTION 2

Subsection (a) would amend paragraph (1) of section 4(f) of the act which provides an exemption from the provisions of the act where age is a bona fide occupational qualification to make it clear that where this is the case an employer could lawfully require mandatory retirement at that specified age.

Subsection (b) would amend paragraph (2) of section 4(f) of the act which contains the exemption for a bona fide seniority system or any bona fide employee benefit plan by excluding from that exemption the application of a provision in such a seniority system or employee benefit plan which would require or permit the involuntary retirement of any employee because of age.

Subsection (c) would delay the effective date of the prohibition against mandatory retirement policies between ages 65 through 69 if such provisions are contained in employee benefit plans or seniority systems in effect on September 1, 1977. In such a case the increase in the act's upper age limitation would be effective upon the termination of the agreement or January 1, 1980, whichever comes first.

SECTION 3

This section would amend section 12 of the act which contains the upper and lower age limitations applicable to the provisions of the act.

Subsection (a) would increase the upper age limit of the act to age 70 from the present age 65.

Subsection (b) provides that the increase in the upper age limit shall take effect on January 1, 1979.

SECTION 4

Section 7(d) of the act requires that an individual must give the Department of Labor notice of intent to file suit within 180 days after the alleged unlawful practice occurs. This period is extended to 300

days where the alleged unlawful practice occurs in a state which has an age discrimination statute which provides a remedy. Subsection (a) of section 4 eliminates both of these requirements.

Subsection (b) provides that the elimination of the notice of intent to sue requirement shall take effect with respect to civil actions brought after the date of enactment.

SECTION 5

Subsection (a) of the section 5 amends section 7(e) of the Age Discrimination Act to provide for the tolling of the statute of limitations for the period during which the Department of Labor is making informal attempts to bring about voluntary compliance with the act.

Subsection (b) provides that the amendment made by subsection (a) will take effect with respect to conciliations commenced after the date of enactment.

SECTION 6

This section contains three exemptions to the extension of the act's upper age limitation from age 65 to 70.

Subsection (a) redesignates as subsection (a) the provision of section 12 which contains the act's upper and lower age limitations.

Subsection (b)(1) would permit the compulsory retirement at age 65 of management or highly compensated employees if such employees are entitled to an immediate nonforfeitable annual retirement benefit from a pension, profitsharing, savings, or deferred compensation plan from his employer which equals in the aggregate at least $20,000, exclusive of any Social Security benefit.

Subsection (b)(2) requires the Secretary to annually adjust the $20,000 figure to reflect increases or decreases in the cost of living.

Subsection (b)(3) provides that if an employee's retirement income is in a form other than a straight life annuity, the Secretary of Labor, in consultation with the Secretary of Treasury, shall issue regulations to adjust the employee's retirement income for purposes of the $20,000 test to reflect the level of income actually provided by the employer wishing to initiate compulsory retirement.

Subsection (c) permits the compulsory retirement at age 65 of college and university faculty who are serving under a contract or similar arrangement providing for unlimited tenure.

Subsection (d) permits the compulsory at age 65 of teachers at public elementary and secondary schools who are serving under a contract unlimited tenure.

Section 7 directs the Secretary of Labor to conduct a study of the effects of raising the upper age limitation of the act from 65 to 70. Such study shall be completed and a report filed three years after the effective date. An interim report must be submitted within two years of the effective date. In conducting the study, the Secretary is directed to consider the effect of raising the upper age limitation to 70, the feasibility of raising the limit above 70, and the feasibility of lowering the minimum age coverage under the act.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this act may be cited as the "Age Discrimination in Employment Act of 1967".

STATEMENT OF FINDINGS AND PURPOSE

SEC. 2. (a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting or arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

EDUCATION AND RESEARCH PROGRAM

SEC. 3. (a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this Act, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures—

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) public and otherwise make available to employers, professional societies, the various media of communication, and other

interested persons the finding of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community information and educational programs.

(b) Not later than six months after the effective date of this Act, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 12.

PROHIBITION OF AGE DISCRIMINATION

SEC. 4. (a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any maner in an investigation, proceeding, or litigation under this Act.

(e) It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or pub-

lished, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this [section] *section, including the establishment of a mandatory retirement age less than the maximum age specified in section 12 of this Act,* where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any [individual; or] *individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12 of this Act because of the age of such employee; or*

(3) to discharge or otherwise discipline an individual for good cause.

STUDY BY SECRETARY OF LABOR

SEC. 5. The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress.

ADMINISTRATION

SEC. 6. The Secretary shall have the power—

(a) to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this Act;

(b) to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this Act.

RECORDKEEPING, INVESTIGATION, AND ENFORCEMENT

SEC. 7. (a) The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance with the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 209 and 211).

(b) The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor

Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): *Provided*, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

[(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—

(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

(2) in a case to which section 14(b) applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.]

(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

[(e) Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act.]

(e) For the period during which the Secretary is attempting to effect voluntary compliance with requirements of this Act through informal methods of conciliation, conference and persuasion pursuant to subsection (b), the statute of limitations as provided in section 6 of the Portal-to-Portal Act of 1947 shall be tolled.

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NOTICES TO BE POSTED

SEC. 8. Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this Act.

RULES AND REGULATIONS

SEC. 9. In accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code, the Secretary of Labor may issue such rules and regulations as he may consider necessary or appropriate for carrying out this Act, and may establish such reasonable exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest.

CRIMINAL PENALTIES

SEC. 10. Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Secretary while he is engaged in the performance of duties under this Act shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or both: *Provided, however*, That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

DEFINITIONS

SEC. 11. For the purposes of this Act—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general com-

mittee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa,


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Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

[LIMITATION

[SEC. 12. The prohibitions in this Act shall be limited to individuals who are at least forty years of age but less than sixty-five years of age.]

LIMITATION

SEC. 12. (a) The prohibitions in this Act shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

(b) (1) Nothing in this Act shall be construed to prohibit compulsory retirement of employees who have attained 65 years of age but not 70 years of age, and who are members of a select group of management or highly compensated employees, if any such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $20,000.

(2) The Secretary shall adjust annually the $20,000 amount specified in paragraph (1) for increases or decreases in the cost of living in accordance with regulations prescribed by the Secretary.

(3) In applying the retirement income test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Secretary, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(c) Nothing in this Act shall be construed to prohibit compulsory retirement of employees who have attained 65 years of age but not 70 years of age, and who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education as defined by section 1201 (a) of the Higher Education Act of 1965.

(d) Nothing in this Act shall be construed to prohibit compulsory retirement of teachers who have attained 65 years of age but not 70 years of age, and who are serving under a contract of unlimited tenure in a local educational agency of a State, if State law in effect at the date of enactment of the Age Discrimination in Employment Amendments of 1977 provides for such retirement.

ANNUAL REPORT

SEC. 13. The Secretary shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the effect of the minimum and maximum

ages established by this Act, together wtih his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the general age level of the population, the effect of the Act upon workers not covered by its provisions, and such other factors as he may deem pertinent.

FEDERAL-STATE RELATIONSHIP

SEC. 14. (a) Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action.

(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

NONDISCRIMINATION ON ACCOUNT OF AGE IN FEDERAL GOVERNMENT EMPLOYMENT

SEC. 15. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of the section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

EFFECTIVE DATE

SEC. 16. This Act shall become effective one hundred and eighty days after enactment, except (a) that the Secretary of Labor may extend the delay in effective date of any provision of this Act up to an additional ninety days thereafter if he finds that such time is necessary in permitting adjustments to the provisions hereof, and (b) that on or after the date of enactment the Secretary of Labor is authorized to issue such rules and regulations as may be necessary to carry out its provisions.

APPROPRIATIONS

SEC. 17. There are hereby authorized to be appropriated such sums, not in excess of $5,000,000 for any fiscal year, as may be necessary to carry out this Act.

Approved December 15, 1967.

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ADDITIONAL VIEWS OF SENATOR JACOB K. JAVITS (R.-N.Y.)

I have had a special interest in age discrimination legislation for many years. I introduced my first such bill in 1951 when I was a Member of the House of Representatives. My efforts reached fruition in 1967 when the Age Discrimination in Employment Act of 1967 was passed. I had the privilege of participating extensively in the legislative consideration of the administration bill which, with the addition of a number of amendments that I sponsored, became law.

I have viewed the act's present protection of workers who are at least 40 but less than 65 years of age from discrimination in employment on the basis of age as a first step in protecting older employees. Earlier this year, I introduced legislation with Senators Eagleton and Chafee to phase out gradually the Act's upper age limit by 1985. Our bill also clarified the 4(f)(2) bona fide employee benefit plan exception so that pension plans would not require the forced early retirement of employees.

There is nothing preordained about the 65 upper age limit of the Age Discrimination Act. Former Secretary of Labor Willard Wirtz acknowledged that it was selected simply because the Social Security Act used that age. If we look at the history of the Social Security Act, we see that age 65 was selected somewhat arbitrarily, in part because of the tradition of the use of this age in pre-war Germany's social security system.

With advances in medical science and in the standard of living, life expectancies in the United States have steadily increased since the time when age 65 was first incorporated into law. Age 65 is not as old as it once was, and our laws on age discrimination should take this into account.

It has always seemed unjustifiable to me to permit employees to be forced into retirement solely because they have reached an arbitrarily established age. Mandatory retirement at any specific age fails to take account of differential aging and the effects of aging on different skills. It could waste well-developed abilities and mature judgment which can be of great benefit to society. In addition, mandatory retirement accelerates the aging process and can worsen physical and emotional problems.

Because of political realities and my desire to see age legislation passed this year, I decided to throw my support to the more conservative position of raising the age cap to 70.

Contrary to charges that Congress is blindly leaping into the unknown, there is an established track record for mandatory retirement ages above 65. Corporations like Bankers' Life & Casualty Co. have had no compulsory retirement for over 30 years. The Civil Service System has effectively operated with an upper age limit of 70, and General Motors Corporation uses age 68 as its compulsory retirement age.

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Some employers have claimed that raising the mandatory retirement age will cause aged and unproductive employees to linger on. The record, however, strongly suggests otherwise.

The trend in recent times has been toward early retirement. In 1974, 72 percent of all new Social Security retirees opted for reduced benefits with age 62 as the overwhelmingly most common age. From 1960 through 1976, 60 percent of GM's hourly employees retired before age 65, and 13 percent retired at the mandatory age of 68. In 1976, only 2 percent of such GM employees worked until age 68. Bankers Life, which has no mandatory retirement age, reports that in 1968 only 3 percent of their employees were age 65 and over, and in 1977 that figure went to 4 percent. At Connecticut General Life Insurance Company, which recently eliminated compulsory retirement, two of 50 retiring employees decided to stay on in 1977.

A recent Roper poll found that nearly two-thirds of Americans would like to retire before age 62, and over one third prefer to retire before reaching 60. The Labor Department estimates that raising the mandatory age will increase the labor force by about 175,000 to 200,000 persons out of over 90 million workers.

I should add that at all times an employer may discharge an unproductive employee, whether age 70 or younger, for cause.

Employers have also expressed concern that the costs of funding their pension plans will increase if the mandatory retirement age is raised. Our analysis, which has been supported by the Labor Department, is that pension costs will not increase and, in fact, will decrease if workers stay on the job past age 65. The longer an employee works, the shorter the period retirement payments will have to be made. Savings would also come from the added years of accumulated interests on the pension assets. Additional savings would arise from the fact that a plan need not provide for further benefit accruals after the participant reaches the plan's normal retirement age. Added years of service do not necessarily increase the ultimate retirement benefit or the cost of providing it. It should also be noted that higher medical costs for 65 year old workers would be covered by the federal Medicare program.

In order to allay fears about raising the age cap, the Senate Human Resources Committee voted for a number of amendments. The Committee bills provide an exemption for corporate executives who receive $20,000 or more in retirement benefits from their employer. It also provides exemptions for teachers who have unlimited tenure at public, elementary and secondary schools as well as higher educational institutions, whether public or private. At the administration's request, clarifying language was approved which permits the establishment of a designated retirement age less than age 70 where age has been shown to be an important indicator of job performance. The effective date for the age cap has been moved back to January 1, 1979 and for collectively bargained pension plans which have 65 as the mandatory retirement age, the effective date for making changes will be no later than January 1, 1980.

The corporate executive exemption is troublesome corporations which have no compulsory retirement have used sophisticated management techniques to avoid blocked lines of progression for executives. For example, years of service in any one position could be limited,

much the way the President of the United States' term of office is restricted. Rotation of personnel between different divisions could also be stipulated, as could increased pension benefits for early retirees. Company growth, organizational structure changes, and employee counseling are other factors to be considered. A recent poll of 450 executives indicated that only 13 percent planned to work past age 65. This poll suggests that executives do not wish to stay on the job any longer than the hourly employees they supervise.

The tenured teacher exemptions, in my view, are also troubling. The elementary and secondary public school teacher exemption is potentially overbroad. There are approximately 2,190,000 elementary and secondary public school teachers who could be covered by this exemption. The committee hearing record contains no estimates on the number of public school teachers covered by superior state mandatory retirement statutes who would not come under this exemption. It is fair to say that the committee acted on this amendment without sufficient information.

With respect to college faculty, the percentage of professors who work past age 65 where permitted to do so is only 0.027 percent of the number of tenured professors who are eligible to do so. In New York State, where professors in the state system are required to retire at age 70, only 12 of 10,000 professors in the system are between the ages of 65 and 70. It appears that the trend toward early retirement among professors may be greater than the trend for the general population and that the need for a professor's exemption may be woefully lacking.

Raising the mandatory retirement age gives employees greater freedom to determine whether to retire or continue working. Every day of delay and every exemption from coverage means the denial of this expanded freedom of choice. I for one think our workers deserve the right to decide for themselves when they want to retire. I am pleased that Senators Cranston and Riegle (in accompanying separate views) share my view on the tenured teacher, college professor and corporate executive exemptions.

JACOB K. JAVITS.

ADDITIONAL VIEWS OF SENATORS CRANSTON AND RIEGLE

Although heartily in support of the thrust of S. 1784 as it seeks to raise from 65 to 70 the upper age limit of the Age Discrimination in Employment Act, we strongly oppose the amendments, adopted during full committee consideration, to exclude tenured teachers, college professors, and certain business executives.

We firmly believe that an individual's competence, not age, should determine his or her job performance capability, and that this is so regardless of the category of work involved. The exclusion of these categories of employees from the protection of the Act would be contrary to this principle. The Age Discrimination in Employment Act provides for exemptions where age is actually a relevant factor in determining an employee's ability to perform. However, the blanket exclusions adopted by the full Committee bear no relationship to questions relating to competency.

While various employer groups and organizations have expressed to committee members their desires to obtain exclusion of these employees from the coverage of the Act, such exclusions were not considered during the hearings on S. 1784, nor have any data been presented to the Committee on the impact of these exclusions.

The Age Discrimination in Employment Act is a cornerstone in our national commitment to secure the basic civil rights of all citizens, including older Americans. Age discrimination, like other forms of arbitrary discrimination, is contrary to our fundamental principles of equal treatment and equal rights for all Americans. For these reasons, we emphatically oppose these exclusions and will propose their deletion when S. 1784 is considered by the full Senate.

ALAN CRANSTON.
DONALD RIEGLE.

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